ISSUES

I. Whether Claimant provided clear and convincing evidence to overcome Dr. Green's DIME opinion that Claimant sustained 0% permanent impairment of the cervical spine.

FINDINGS OF FACT

1. Claimant worked for Employer as a general manager.

2. Claimant sustained an admitted industrial injury on October 1, 2019. Claimant was loading a bedroom set of furniture into a box truck. While holding her right hand up against the stacked furniture, she reached down for a strap to secure the furniture when the wooden headboard fell and hit her on the back of the head and neck. Claimant testified that she was knocked unconscious and, upon regaining consciousness, she was bleeding from her head, and experienced pain in her head and neck as well as flashes in her vision.

3. Claimant was taken to North Suburban emergency department. She reported she had lost consciousness from the blow to her head and neck and was experiencing dizziness, nausea, headache and neck stiffness. The exam showed a laceration to her scalp, dried blood and a hematoma. Her principal diagnoses were a head injury with a laceration to her scalp and loss of consciousness. Imaging of her neck showed degenerative changes and no acute findings. Her scalp laceration was closed with five staples, and she was prescribed pain medication.

4. On October 2, 2019 Claimant was seen at authorized treating provider (ATP) Concentra by Lacie Esser, PA-C. Claimant reported that she was unsure if she as completely unconscious after the work incident. She complained of throbbing pressure in her head and neck stiffness. The physical examination of Claimant's cervical spine showed tenderness in her neck into her upper back muscles and limited range of motion in her cervical spine with pain in all directions. Cervical strain was added as a diagnosis and Claimant was prescribed a muscle relaxer.

5. Claimant returned to Concentra on October 4, 2019 and was seen by Alan Shackelford, M.D. Claimant continued to complain of headache with a pressure sensation, pain at the site of her injury, as well as neck pain and stiffness. Dr. Shackelford's examination of Claimant's neck documented tenderness from the base of her head, occipital level, down to C4-7 and in her upper back. He also documented limited and painful range of motion. Under psychiatric, Dr. Shackelford listed poor recent memory and depressed mood. He referred Claimant for a neurologic examination and removed Claimant from work. On October 7, 2019, Paula Pook, M.D. at Concentra referred Claimant for physical therapy.

6. On October 14, 2019 Claimant returned to Concentra and was seen by PA-C Esser. She reported that the muscle relaxer was not helping. Physical examination documented tenderness in the upper level of her cervical spine, upper level of her left and right paraspinal muscles and left and right trapezius with limited range of motion and pain in all directions. Claimant was referred to a physiatrist.

7. Claimant began physical therapy with Brittany Comer, PT at Concentra later that day with a diagnosis of cervical strain and a goal to improve cervical rotation. Claimant attended nine sessions of physical therapy and her cervical improvement was "as expected" and it was noted that active treatments would be continued through chiropractic treatment and acupuncture for her cervical and upper spine.

8. On October 29, 2019 Claimant was examined by physiatrist, John Sacha, M.D. Dr. Sacha noted Claimant presented mildly anxious and tearful after the physical examination. His cognitive examination noted excellent recall, although slow processing, and had to think about things temporarily, but would remember her entire injury, both pre and post injury. His neck exam showed cervical paraspinal spasm and segmental dysfunction in the mid to upper cervical spine. With deep palpation of her cervical facets, Dr. Sacha objectively reproduced her headaches as well as dizziness. Claimant had pain with cervical extension, external rotation in the right greater than the left side and showed a positive Tinel's test over the occipital nerve. Dr. Sacha diagnosed Claimant with cervical facet syndrome; whiplash-associated disorder; and occipital neuralgia. He noted the could not rule out possibility of a minimal concussion but there was no evidence of a closed head injury or residual from this. Dr. Sacha recommended chiropractic care and acupuncture.

9. Claimant underwent eight chiropractic sessions with Don Aspergren, D.C. from November 5, 2019 through February 14 2020 and four acupuncture therapy sessions from December 11, 2019 to January 8, 2020. Her chief complaints were head and neck pain. She described her pain as stabbing and aching, rating her pain 6/10, and had sleep disturbances. Dr. Aspergren's physical examination reported neck tenderness and limited range of motion, with an absence of Waddell's signs, non-organic signs, and pain behaviors.

10. Claimant returned to Dr. Sacha on November 13, 2019. She reported temporary improvement with chiropractic and acupuncture treatments, but continued neck pain. On exam, Dr. Sacha noted cervical paraspinal spasm and segmental dysfunction in the mid to upper cervical spine, pain with extension and external rotation and diminished range of motion. Dr. Sacha subsequently referred Claimant for a cervical spine MRI.

11. At a follow-up evaluation on November 20, 2019 Claimant reported increased anxiety and depression related to her physical symptoms. Dr. Sacha noted that the cervical spine MRI revealed straightening of her cervical lordosis and was otherwise negative. He added the diagnosis of adjustment disorder. Dr. Sacha recommended that Claimant undergo bilateral C2-C5 facet injections plus bilateral third occipital nerve

blocks. He discontinued the muscle relaxers, Diclofenac and Robaxin, and ordered Gabapentin 300 and Paxil, both for adjustment disorder but also to help with pain and headaches.

12. On December 2, 2019, Dr. Pook noted examination of Claimant's cervical spine showed tenderness in her upper cervical spine, upper left and right paraspinal and bilateral trapezius muscles. Palpation revealed bilateral muscle spasms with pain in all directions. She continued the diagnoses cervical strain, concussion and acute head injury.

13. On December 10, 2019 Claimant presented to neurosurgeon Michael Rauzzino, M.D. He reviewed Claimant's November 15, 2019 cervical MRI and did not see any reason for surgical intervention. He diagnosed Claimant's neck injury as a soft tissue injury and agreed with Dr. Sacha's recommendation for cervical injections.

14. On December 12, 2019 Dr. Sacha performed bilateral C2-3 intraarticular facet injections, bilateral C3-4 intraarticular facet injections and bilateral third occipital nerve blocks. Prior to the injections, Claimant's pain scale was 7/10 at rest and 8/10 with provocative maneuvers. Thirty minutes after the procedure Claimant reported 100% relief of her headaches and neck pain, which Dr. Sacha noted indicated a diagnostic response and involvement of posttraumatic facet syndrome at those levels.

15. Claimant returned to Dr. Sacha on January 3, 2020 reporting lasting relief from the injections of 40% on the left side and 20% on the right side. Claimant reported experiencing ongoing anxiety and night terrors, which increased with taking Gabapentin. Dr. Sacha removed Claimant from Gabapentin and referred her for a psychological evaluation to determine whether she was psychologically stable to advance treatment with a medial branch nerve block and radiofrequency neurotomy. He continued his diagnosis of cervical facet syndrome and added anxiety to the previous adjustment disorder diagnosis.

16. On January 17, 2020 Claimant made a trip to Nebraska. On that day she took Gabapentin, Lyrica and her depression and anxiety medications. She also took a Percocet, which she had been prescribed by her OBGYN doctor in 2017 and also by her dentist the year before because she had pain that morning and knew it was going to be a long trip. Claimant testified that, at the time, she did not realize that Percocet contained Oxycodone. While in the car, Claimant went into cardiac arrest and respiratory failure, which led to her 6-day hospitalization. During her hospital stay, Claimant was prescribed Clonazepam and Prazosin at bedtime for complaints of panic and nightmares.

17. On January 28, 2020 Claimant transferred to a new ATP, Matt Miller, M.D. Dr. Miller reviewed Claimant's prior medical, social and work history and noted Claimant's complaints of fainting, headaches, loss of balance and coordination and motor weakness. On physical examination Dr. Miller noted neck tenderness with range of motion slightly limited and pain with loading of facets. He diagnosed Claimant with a concussion and

cervical sprain and strain and referred Claimant to see Kevin Reilly, Psy.D., a neuropsychologist, to assess Claimant's cognitive and emotional status.

18. Claimant saw Dr. Reilly on January 31, 2020 and February 14, 202. Dr. Reilly concluded,

> The results of this evaluation are strongly indicative of non-organic factors mediating symptom production and/or maintenance. Performance validity testing indicated negative response bias (poor effort). Symptom validity testing indicates exaggeration. The patient's clinical presentation was suggestive of medication seeking for reported anxiety and stress symptoms. Objective measures of emotional functioning were invalid and unreliable.

(R. Ex. H, p. 204).

19. On February 4, 2020 Dr. Miller recommended six additional visits of chiropractic/acupuncture treatment. He diagnosed a sprain of cervical spine and concussion.

20. On February 17, 2020 Claimant was at home washing dishes when she felt dizzy and fainted. She was taken by ambulance to St. Anthony North Hospital and after testing was found to have low blood pressure and low potassium. She was diagnosed with low potassium.

21. Claimant presented to Samuel Y. Chan, M.D. at Mile High Sports and Rehabilitation Medicine on February 21, 2020. He reviewed her January and February emergency room/hospital records and Dr. Reilly's neuropsychological evaluation in which Dr. Reilly considered Claimant's testing invalid for lack of effort and symptom magnification. Claimant reported that she was unable to recall if the cervical injections were helpful. Dr. Chan later noted in his report that Claimant noted the injections offered no significant benefits. Claimant reported that her headaches and dizziness were worsening and identified her cervical spine as the source of her headaches and dizziness. On examination, Dr. Chan noted cervical spine range of motion was slightly limited in flexion and extension due to pain, as well as tenderness over the cervical paraspinal musculature. Dr. Chan diagnosed Claimant with post-concussion headache; cervical facet joint syndrome; migraine syndrome; and myalgia. He referred Claimant for a neurologic consultation.

22. Claimant presented to Gary Gutterman, M.D. for a psychiatric examination on March 2, 2020. Dr. Gutterman noted Claimant's history of significant family dysfunction in her early years, including sexual abuse. She had been treated with anti-anxiety medication in 2008 and briefly received psychotherapy in 2010 without medication. She related that her work injury made her anxious and depressed because she now had to rely upon other people when she had been self-reliant and in full control before the accident. Dr. Gutterman opined that Claimant likely experienced a concussion/mild

traumatic brain injury as a result of the work injury. He further opined that Claimant experienced Adjustment Disorder with Mixed Emotional Features, both associated with her concussion as well as her inability to maintain a sense of control. Due to Claimant's persisting anxiety and depression, he recommended that Claimant increase her Clonazepam to .5 mg and increase her Prazosin to 2 mg tablets, one to two at night to control her nightmares which included falling and losing control. He started her on Escitalopram, 10 mg, to treat anxiety and depression.

23. Claimant returned to Dr. Chan on March 18, 2020. Claimant continued taking panic and nightmare medications, Clonazepam and Prazosin, and except for Lidothol patches and Tylenol, she was not taking any pain medication. On examination, Dr. Chan noted significant limitation of cervical range of motion and tenderness to palpation of her cervical spine and paraspinal muscles. He noted that Claimant reported the prior facet injections had no benefit at all whatsoever. Dr. Chan remarked that Claimant's reported worsening symptoms were nonphysiologic.

24. On March 19, 2020 Claimant presented to Haley Burke, M.D. for a neurologic examination. On examination, Dr. Burke noted non-painful cervical range of motion with tenderness to palpation throughout the occipital, suboccipital and cervical paraspinal muscles. Exams were unremarkable from a neurologic standpoint. Dr. Burke diagnosed Claimant with chronic post-traumatic headache, not intractable, and anxiety. She opined that further interventions for Claimant's neck pain are unlikely to be helpful. Dr. Burke noted that Claimant's headache symptoms were not characteristic of cervicocranial syndrome from acute trauma. She opined that there is the possibility that Claimant's underlying anxiety and PTSD from her past personal history may be magnifying Claimant's symptoms.

25. Claimant returned to Dr. Gutterman on March 19, 2020. Her mood was more stable with less anxiety since an increase of her Clonazepam dosage and the addition of Escitalopram. Dr. Gutterman increased her dosage of Escitalopram to 20 mg daily and recommended she take Clonazepam, 0.5 mg one tablet during the day and two tablets at night since she was experiencing early morning awakening. Her nightmares which had previously abated were returning to some degree, so Dr. Gutterman increased her Prazosin to 5 mg.

26. Claimant saw Dr. Miller on March 31, 2020 via a telehealth appointment. On examination Dr. Miller noted that Claimant showed "decent" range of motion with minimal pain. He continued Claimant's physical therapy.

27. On April 15, 2020, Claimant's physical therapist noted that Claimant's signs and symptoms were "more consistent with chronic pain behaviors rather than actual limitations in Cervical ROM or function. When pressed, she demonstrates pretty good ROM in the C Spine." (R. Ex. R, p. 512).

28. Claimant returned to Dr. Gutterman on April 16, 2020. Dr. Gutterman started Claimant on Propranolol 20 mg for Claimant's persistent anxiety. Her nightmares persisted but Dr. Gutterman did not increase her Prazosin.

29. On April 23, 2020 Claimant saw Dr. Chan via a telehealth appointment. Claimant reported soreness and tightness over the posterior cervical spine area and occipital-type headaches. He noted that further interventions may consider the use of a beta block or a biofeedback program. Dr. Chan remarked,

> There are definitely findings on clinical examinations, as well as reports, that do not completely coincide with a diagnosis of cervicogenic syndrome or postconcussive syndrome. Thus, there is certain embellishment. The concern is whether this is magnified from underlying psychological issues such as anxiety or even PTSD that the patient does not want to disclose.

(R. Ex. J, p. 223).

30. Claimant returned to Dr. Miller on April 28, 2020 via a telehealth appointment. On examination Dr. Miller noted that Claimant appeared to have very good cervical range of motion with no obvious pain. Dr. Miller informed Claimant that they were running out of treatment options. He noted that there was not much more to offer in terms of treatment for Claimant's neck, as Claimant had injections in the past and reported that they made her worse. He instructed her to continue to see Dr. Gutterman and Dr. Chan and he would contact Dr. Gutterman to see if there was anything further to offer. He planned to move to MMI with an impairment rating and to return Claimant to work in mid-May at full duty.

31. On May 13, 2020 Claimant was seen again by Dr. Chan via a telemedicine appointment. Claimant continued to complain of headaches. On examination Dr. Chan observed limited cervical spine range of motion. He again reviewed Claimant's November 15, 2019 cervical MRI, noting there was no specific pathology except for diffuse degenerative changes. Dr. Chan opined that Claimant had come to a plateau from a physical medicine and neurological standpoint. Claimant did not wish to participate with any medicinal usage for her physical condition. Dr. Chan noted that she should continue with psychological care with Dr. Gutterman until she reached MMI and to follow up with Dr. Miller.

32. Claimant was again seen by Dr. Miller on May 13, 2020, via a telehealth appointment. She continued to complain of pain in her neck, headaches, anxiety and panic attacks. Dr. Miller returned Claimant to work at four hours per day, and 20-pounds maximum lift and 20-pounds pushing and pulling.

33. Claimant returned again to Dr. Gutterman on May 14, 2020. Her mood was more stable since increasing the dosage of Escitalopram. She continued to experience anxiety and would scratch her arms and legs during these episodes. Dr. Gutterman recommended that Claimant increase her Propranolol to 20 mg. She stated she was sleeping better, and her nightmares were less frequent and intense.

34. Claimant saw Dr. Miller on June 2, 2020. Claimant had experienced headaches for the past three days at a pain level 6/10. She had not started biofeedback because of COVID-19. Dr. Miller noted good cervical range of motion.

35. Claimant continued to treat with Dr. Gutterman. On June 9, 2020 Dr. Gutterman noted that he planned to place Claimant at MMI in the next couple of months to give her enough time to adapt to return to work. Due to her persisting anxiety, Dr. Gutterman prescribed Claimant Aripiprazole 5 mg ½ tablet on June 29, 2020.

36. Claimant was again seen by Dr. Miller on July 30, 2020. Claimant complained of 6/10 pain. She was working 12 to 13 hours per day at regular duty and reported not being happy with her role at work. Dr. Miller noted that he was waiting for Dr. Gutterman to complete treatment before he placed Claimant at MMI.

37. On August 5, 2020 Robert Kleinman, M.D. performed a psychiatric IME at the request of Respondents. His report included a review of Claimant's medical records for her injury, including Dr. Reilly's report, as well as a review of Claimant's pre-injury psychological treatment, social and family history. Dr. Kleinman diagnosed Claimant with adjustment disorder with anxiety and depressed mood resolved with medications**;** mild neurocognitive disorder secondary to traumatic brain injury, resolved; psychological factors affecting medical condition; and factitious disorder. Dr. Kleinman opined that Claimant is an unreliable historian and that only her objective findings should be treated and rated. He noted that Claimant's mental health complaints and report of cognitive deficits were undermined by the psychological and neurocognitive testing. Dr. Kleinman explained that there was evidence of exaggerated symptom reporting and symptom magnification and nonorganic factors influencing her neuropsychometric performance. He concluded that Claimant did not have posttraumatic stress disorder related to her injury and that she was at MMI. Dr. Kleinman wrote that Claimant had a minimal mental health impairment of 3% related to being on psychiatric medications after the injury and at the time of MMI.

38. Dr. Gutterman reevaluated Claimant on August 19, 2020. Dr. Gutterman noted that Claimant's mood was more stable, and that her outlook more positive since the last increase of medication. He remarked that her anxiety remained reasonably under control and that her nightmares had abated. She continued to report some short term memory difficulties. Based on her neuropsychological evaluation by Dr. Reilly which showed exaggerated responses, Dr. Gutterman did not believe there was an organic explanation for her complaint of short term memory difficulty and denied Claimant a rating for concussive syndrome. Dr. Gutterman concluded that Claimant's psychiatric symptoms had significantly abated, and placed Claimant at MMI. He recommended that Claimant continue on psychotropic medications for an additional three to six months as well as psychiatric follow-up as maintenance treatment. Dr. Gutterman wrote, "I believe that [Claimant] has experienced a 3% permanent partial mental impairment as a result of her continuing on psychotropics at the time that she has reached psychiatric maximum

medical improvement. The Division of Labor encourages a minimal mental impairment of 1 to 3% in such instances." (R. Ex. G, p. 174).

39. Dr. Miller placed Claimant at MMI at a September 30, 2020 evaluation. Claimant reported 8/10 pain with neck stiffness and headaches. On examination Dr. Miller noted diffuse tenderness of the neck with no spasm. He noted the following maximum cervical ranges of motion: flexion 46 degrees, extension 52 degrees, right lateral flexion 50 degrees, left lateral flexion 47 degrees, right rotation 61 degrees and left rotation 50 degrees. Dr. Miller's final diagnosis was concussion, sprain of cervical spine and adjustment disorder. He noted that Claimant had diffuse degenerative changes of the cervical spine but no focal disc herniations. Dr. Miller assigned 4% whole person rating under Table 53(II)(B) of the AMA Guides for a soft tissue lesion, unoperated, with medically documented injury and a minimum of six months of medically documented pain and rigidity. He further assigned 5% whole person impairment for range of motion deficits, totaling 9% whole person impairment of the neck. Dr. Miller noted that Dr. Gutterman performed a psychological rating of 3% as Claimant was on medication, and further noted that combining these ratings would yield a final rating of 12% whole person. Dr. Miller recommended maintenance care in the form of psychological medications and treatment with Dr. Gutterman for one year and six sessions of biofeedback.

40. Respondents requested a DIME. On the DIME Application, Respondents checked only Region 4: Spine; Cervical. Respondents did not check Region 3 Psychological or Traumatic Brain Injury.

41. Dr. Green performed the DIME on January 18, 2021. He noted that, per the request for a DIME, the cervical region was the area to be evaluated. Dr. Green reviewed Claimant's medical records. He listed various records under the heading "Pertinent Medical Records were identified to include the following…" (R. Ex. C, p. 48). Dr. Green did not list any of Dr. Gutterman's records. He did note that he reviewed Dr. Miller's September 30, 2020 report. Under the section of his DIME report title "Psychological Evaluation If Applicable" Dr. Green wrote, "Performed, per review of medical records, however, not evaluated within the context of this Examiner's report." (R. Ex. C, p. 50).

42. Dr. Green noted that the cervical MRI revealed multilevel cervical spondylosis without other focality or significant stenosis. Claimant reported to Dr. Green 7-8/10 pain described as constant shooting stabbing, occasionally burning, dull achy pain from her midline occiput down to approximately her cervicothoracic junction. On examination, Dr. Green noted mild pain behaviors and sighing, occipital tenderness and muscle tightness and spasm over both upper trapezium. Dr. Green performed cervical range of motion measurements on January 18, 2021 and January 25, 2021. The cervical range of motion measurements from January 18, 2021 were as follows: flexion 30 degrees, extension 27 degrees, right lateral flexion 22 degrees, left lateral flexion 16 degrees, right rotation 24 degrees, and left rotation 14 degrees. He noted the following cervical range of motion measurements on January 25, 2021: flexion 28 degrees, extension 33 degrees, right lateral flexion 25 degrees, left lateral flexion 25 degrees, right rotation 37 degrees, and left rotation 33 degrees.

43. Dr. Green diagnosed Claimant status post 10/1/2019 work injury with head contusion/cervical strain; no evidence for clinical upper extremity radiculopathy; nonphysiological pain presentation per review of medical records; and mild pain behavior on exam. He agreed with Dr. Miller's MMI date of September 30, 2020. Based on the AMA Guides, he assigned 4% cervical impairment under Table 53(II)(B), combined with cervical range of motion impairment of 5%, totaling 9% whole person impairment. He chose to use Dr. Miller's range of motion measurement due to the discrepancy between his range of motion measurements taken on January 18 and January 25, 2021. He explained, "Due to nonphysiologic character and history noted in the records, I would elect to use Dr. Miller's range of motion measurements of 5% impairment from 09/30/2020." (R. Ex. C, p. 51). Regarding the rationale for his decision, Dr. Green wrote, "The claimant did have a documented contusion to her head with ER documentation of complaints of neck pain at the onset of her work-related injury." (Id.) Dr. Green did not specifically address a psychological impairment rating. He opined that Claimant did not require work restrictions or maintenance care.

44. On April 23, 2021 John Raschbacher, M.D. performed an Independent Medical Examination (IME) at the request of Respondents. Claimant reported neck discomfort with pain and achiness as well as headaches more severe than what she experienced prior to the work injury. Dr. Raschbacher reviewed Claimant's medical records, including records predating the work injury. Claimant reported midline posterior lower cervical tenderness to palpation and some mild bilateral upper medial scapular tenderness. Dr. Raschbacher noted shoulder forward flexion of 144 degrees on the right and 152 degrees on the left; active cervical range of motion forward flexion 29/2, 28/0, and 19/0; cervical extension 36/5,37/2 and 32/4; right lateral bend 27/4, 30/4 and 27/0; left lateral bend 30/2, 28/3 and 25/1; and cervical right rotation 40, 38, and 32, left 47, 32 and 33.

45. Dr. Raschbacher opined that Claimant did not sustain any permanent impairment of the cervical spine. He explained that Claimant "had scattered and mild degenerative changes of the cervical spine, pre-existing and not work-related, and had no clear objective basis at the cervical spine for an impairment rating…" (R. Ex. A, p. 9). Dr. Raschbacher opined that there was no clear objective pathology stemming from the October 1, 2019 work incident. He noted that, at his evaluation, Claimant had significant reduction of range of motion without any clear basis. He further noted that at Dr. Green's DIME evaluation, Claimant had 18% range of motion with a great deal of limitation of motion in all planes that has not been substantiated by any objective findings and that would not be expected medically for a cervical strain, even if still symptomatic. He opined that Claimant was likely volitionally restricting her range of motion for the DIME as well as at his evaluation. Dr. Raschbacher further relied on Dr. Kleinman's findings of somatization and significant items that affect Claimant's reports of subjective complaints. He noted Dr. Reilly also found symptom magnification and an inconsistent or poor effort made, which he felt to be strongly indicative of nonorganic factors mediating Claimant's reporting of symptoms. Dr. Raschbacher opined that Claimant reached MMI on September 30, 2020 with no permanent impairment at any body part, including the cervical spine.

46. Dr. Raschbacher testified by deposition on June 4, 2021 as a Level II accredited expert in occupational medicine. He explained that Claimant's cervical MRI showed some preexisting non-work related degenerative findings with no acute findings. Dr. Raschbacher testified that the work injury did not aggravate or accelerate those findings. He stated that, considering the mechanism of injury and history, it was appropriate to assess Claimant as having a work related cervical strain, but that she did not sustain any permanent impairment of the cervical spine. Dr. Raschbacher explained that Claimant did not have any pathology or other diagnosis than the a cervical strain, and that the cervical strain would be expected to heal and not result in permanent restriction or symptomatology.

47. Dr. Raschbacher testified that the Division of Workers' Compensation Desk Aid #11 - Impairment Rating Tips provide that an impairment rating should be given when there is a specific diagnosis and objective pathology. Dr. Raschbacher explained that Claimant's observed range of motion was better when she was not being formally measured. He testified that Claimant's exam findings were not fairly reproducible as required by the Impairment Rating Tips and the AMA Guides. Dr. Raschbacher opined that Claimant does not have a ratable impairment under Table 53 of the AMA Guides. He testified that there are no objective findings for Claimant's neck other than preexisting mild degenerative changes. Dr. Raschbacher acknowledged that you can give a rating for soft tissues lesions under Table 53 of the AMA Guides, but explained that Claimant's neck strain was a temporary soft tissue lesion. He testified that, although the medical records document more than six months of treatment, Claimant's providers were purely treating her subjective complaints and not an anatomic lesions other than a temporary cervical strain.

48. Dr. Green testified by deposition on November 1 and 8, 2021 as a Level II accredited expert in physical medicine and rehabilitation. Dr. Green testified that, at the time of his DIME report, he had not reviewed Dr. Kleinman's report. During the deposition, Dr. Green reviewed the reports of Drs. Kleinman and Raschbacher, which detailed significant concerns with exaggerated symptom reporting and symptom magnification. Based on the new information he review, Dr. Green changed his opinion and opined that Claimant sustained 0% impairment of the cervical spine. Dr. Green testified that his range of motion measurements over the course of two days were consistent with impairment ratings of 18% and 9% for range of motion deficits, which were significantly different from those of Dr. Miller's, which were consistent with a 5% impairment rating for loss of range of motion. Dr. Green testified that he did not have a "good explanation" for the discrepancy in Claimant's presentation and measurements. Dr. Green explained that, based on his review of the new information, he was concerned there was not an accurate reflection of Claimant's range of motion and, possibly, her reports of symptomatology. Dr. Green agreed that the mild degenerative changes of the cervical spine were preexisting and not work related.

49. Dr. Green opined that Claimant remained at MMI with a 0% impairment rating. On cross-examination, Dr. Green acknowledged that cervical facet syndrome and cervical

strains can be specific diagnoses for the purpose of rating under the AMA Guides. He explained that the only objective pathology he documented was loss of cervical range of motion, which Dr. Green now called into question. Dr. Green testified that he conducted his examination and ratings pursuant to the AMA Guides and Impairment Rating Tips. He further testified that he was now unable to correlate. Claimant's her symptomatic reports with his findings. Dr. Green explained that, even if physician obtains valid range of motion measurements, the physician still must consider other factors in terms of interpreting a patient's reported symptomatology. Dr. Green did not address any psychological condition or psychological impairment in his testimony.

50. Claimant testified at hearing that she had a 20-year history of migraines prior to the work injury. She testified that the nature of her headaches changed before and after the work injury. Claimant attributes the difference in the range of motion measurements of Drs. Miller and Green to the fact that she was more "constricted" when she saw Dr. Green because she was no longer undergoing chiropractic treatment or wearing pain patches. Claimant testified that she continues to be prescribed medications by Dr. Gutterman. She stated that she currently experiences daily headaches which begin in her neck and radiate upwards. Claimant testified that she has a history of dizzy spells due to low blood pressure and that she passed out in 2009 and 2010. She acknowledged that she was on anxiety medication for certain periods prior to the work injury.

51. The ALJ finds the opinions and/or testimony of Drs. Green, Kleinman and Raschbacher more credible and persuasive than the opinions of Drs. Miller and Gutterman.

52. Claimant failed to prove it is highly probable Dr. Green's DIME on opinion on permanent impairment is incorrect.

CONCLUSIONS OF LAW

Generally

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

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

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

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

Overcoming the DIME

If the DIME physician offers ambiguous or conflicting opinions concerning MMI or impairment, it is for the ALJ to resolve the ambiguity and determine the DIME physician's true opinion as a matter of fact. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo.App. 2000); *Stephens v. North & Air Package Express Services*, W.C. No. 4-492-570 (February 16, 2005), aff'd, *Stephens v. Industrial Claim Appeals Office* (Colo.App. 05CA0491, January 26, 2006) (NSOP). In so doing, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office*, 984 P.2d 656, 659 (Colo.App. 1998). A DIME physician's finding of MMI and permanent impairment consists not only of the initial report, but also any subsequent opinion given by the physician. *See Andrade v. Industrial Claim Appeals Office*, 121 P.3d 328 (Colo.App. 2005)(ALJ properly considered DIME physician's deposition testimony where he withdrew his original opinion of impairment after viewing a surveillance video); *see also Jarosinski v. Industrial Claim Appeals Office*, 62 P.3d 1082 (Colo.App. 2002)(noting that DIME physician retracted original permanent impairment rating after viewing videotapes showing the claimant performing activities inconsistent with the symptoms and disabilities she had reported).

The party seeking to overcome the DIME physician's finding regarding whole person permanent impairment bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998); *Lafont v. WellBridge D/B/A Colorado Athletic Club* WC 4-914-378-02 (ICAO, June 25, 2015). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the

DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., WC 4-476-254 (ICAP, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., WC's 4-532-166 & 4-523-097 (ICAO, July 19, 2004). Rather, it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Licata v. Wholly Cannoli Café* WC 4-863-323-04 (ICAO, July 26, 2016). When a DIME physician issues conflicting or ambiguous opinions concerning MMI, the ALJ may resolve the inconsistency as a matter of fact to determine the DIME physician's true opinion. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Licata v. Wholly Cannoli Café* WC 4-863-323-04 (ICAO, July 26, 2016).

As found, Claimant failed to prove it is highly probable Dr. Green's DIME opinion on permanent impairment is incorrect. Although Dr. Green initially opined that Claimant sustained 9% whole person impairment of the cervical spine, he subsequently withdrew his original opinion and assigned Claimant a 0% permanent impairment rating. Dr. Green provided justification for the 0% rating in his deposition testimony. He explained that, at the time of his initial opinion, he had not reviewed the reports of Drs. Kleinman and Raschbacher, which detailed significant pre-existing issues and issues of symptom magnification. Dr. Green further explained that, based on his review of the additional information, he did not deem Claimant's reports of symptomatology and her range of motion findings accurate. Dr. Green acknowledged that a cervical strain can be a specific diagnosis under Table 53(II)(B). Nonetheless, he credibly testified that he was unable to correlate Claimant's symptomatic reports with objective findings. Dr. Green testified that he did not have a good explanation for the significant discrepancy in his range of motion measurements taken over the course of two days. Dr. Green did not deem six months of medically documented pain and rigidity in Claimant's records accurate in light of Claimant's symptom exaggeration and non-organic issues.

Dr. Green's opinion is supported by the opinions of Drs. Kleinman and Raschbacher. Numerous treating physicians found that Claimant's physical presentation was exaggerated and not medically based, including a physical therapist, Dr. Chan and Dr. Reilly. IME physicians Drs. Kleinman and Raschbacher credibly determined that Claimant had a factitious disorder and other non-organic issues. Multiple physicians also opined that Claimant's reports of ongoing and worsening symptoms several months after the work injury were not in line with the expected course of an individual who sustained a cervical strain. Claimant has a significant history of preexisting issues with headaches and neck pain, as well as a history of anxiety treated with medication and other non-work related issues which caused syncopal events.

Claimant argues in part that, in addition to being diagnosed with a cervical spine strain, the diagnosis of cervical facet syndrome also constitutes a specific diagnosis for purposes of assigning an impairment under Table 53(II)(B). That Claimant was once diagnosed with cervical facet syndrome does not provide a basis to overcome Dr. Green's opinion. As noted in the medical records, despite reporting to Dr. Sacha experiencing initial and lasting relief from the cervical facet injections, Claimant repeatedly reported to

other physicians that the cervical facet injections provided no relief. More importantly, Drs. Miller and Green did not include cervical facet syndrome in their final diagnoses. Both physicians were aware of Claimant's prior diagnoses and determined that Claimant's final diagnoses included cervical spine strain, not cervical facet syndrome. Accordingly, Dr. Green electing to not assign an impairment rating based on a prior diagnosis of cervical facet syndrome is not highly probably in error.

Based on the totality of the evidence, there is insufficient evidence establishing that it is highly probable Dr. Green erred in his opinion on permanent impairment. To the extent Drs. Miller and Gutterman provided different impairment ratings, their opinions represent mere differences of opinion that do not rise to the level of clear and convincing evidence.

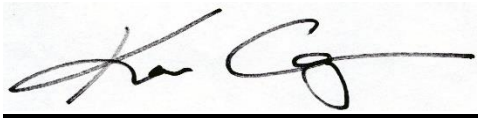
ORDER

1. Claimant failed to overcome Dr. Green's DIME opinion on permanent impairment by clear and convincing evidence.

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

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

DATED: September 1, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

STIPULATIONS

Respondents stipulated that should this court find Claimant sustained a worsening of condition and that the requested surgery is reasonable, necessary, and related, that Dr. Craig Davis is as an authorized treating physician.

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that she suffered a worsening of condition sufficient to reopen her claim for benefits.

II. Whether Claimant proved by a preponderance of the evidence that the requested right shoulder surgery proposed by Craig Davis, M.D., is reasonable, necessary, and related to the July 10, 2020, work injury.

FINDINGS OF FACT

1. Claimant, a 60-year-old female, sustained an admitted right shoulder injury on July 10, 2020. RHE F at 34. Claimant presented for treatment at Concentra Medical Centers on July 13, 2020. *Id*. Claimant reported that she was carrying a box that weighed about 58 pounds when she tripped over a plastic strap on the floor. *Id*. Claimant said that she fell to her knees. *Id*. "A remote hx of right shoulder fracture…" was reported. *Id*.
2. Upon examination of the right shoulder, tenderness in the rhomboids, scapula and supraspinatus were noted with limited range of motion. *Id*. at 35. Claimant was diagnosed with a right shoulder strain, right wrist sprain, lumbar sprain, and a right knee injury. *Id*. at 36. Claimant was prescribed Cyclobenzaprine, Ibuprofen, Lidocaine patches, and referred for physical therapy. *Id*. Claimant started physical therapy on July 13, 2020, with Concentra. RHE G at 63.
3. According to the July 13, 2020, physical therapy notes, Claimant's active range of motion goal for the right shoulder was "Flex 170 or greater Abd 170 or greater…" *Id*. at 64. Claimant's current flex value was noted as 120 and her abd value was reported as 90. *Id*.
4. On August 4, 2020, Claimant attended physical therapy. *Id*. at 75. Claimant's current range of motion for the right shoulder was noted as "Flex 145 ABD 145 Goal Status: Making moderate progress toward goal." *Id*.
5. On August 5, 2020, Claimant attended physical therapy. *Id*. at 78. Claimant's active range of motion goal continued to improve. *Id*. It was noted as "Flex 160 ABD 155 Goal Status: Making significant progress toward goal."

6. On August 11, 2020, Claimant attended physical therapy. *Id*. at 81. Claimant's active range of motion was noted as "Flex 160 ABD 160…" *Id*. Her active range of motion goal was 170. *Id*.

7. Claimant attended a routine appointment at Concentra on August 11, 2020. RHE F at 57. PA Bodkin noted a normal appearance of the right shoulder with full range of motion and motor strength. *Id*.

8. On August 25, 2020, Dr. Carrie Burns placed Claimant at Maximum Medical Improvement (MMI) with no permanent impairment rating and no work restrictions – full duty. *Id*. at 62. Maintenance medical care was recommended, specifically, to finish remaining physical therapy sessions. *Id*.

9. On September 10, 2020, Respondents filed a Final Admission of Liability. RHE B at 6. Respondents admitted to an MMI date of 8/25/2020, and reasonable, necessary, and related maintenance medical care. *Id*.

10. Claimant did not object to Respondents' Final Admission of Liability, file an application for hearing, or pursue a Division Independent Medical Examination.

11. Claimant did not seek treatment for her right shoulder injury until approximately August 2021 with Dr. Franck Belibi. RHE I at 86. Claimant underwent a right shoulder MRI. *Id*. The MRI revealed the following impressions: 1. Focal full thickness to near full thickness tearing of the supraspinatus tendon involving the middle third fibers at the junction of the footprint and critical zone.; 2. Overall mild to moderate rotator cuff tendinosis.; 3. Mild tendinosis of the intra-articular long head biceps tendon.; 4. Mild subacromial/subdeltoid bursitis. *Id*.

12. Claimant met with Dr. Belibi on September 14, 2021. RHE H at 83. Dr. Belibi discussed the MRI results with Claimant. *Id*. A shoulder brace was recommended. CHE 5 at 25.

13. On November 15, 2021, Claimant attended a visit at New West Physicians. RHE J at 94. Claimant reported she was advised to wear a shoulder brace after performance of the MRI and did not see orthopedics. *Id*. Claimant was referred to orthopedics. *Id*.

14. On February 7, 2022, Claimant met with Craig Davis, M.D. RHE K at 98-99. Dr. Davis recommended surgery to repair the rotator cuff. *Id*. at 99. A detailed causation assessment was not performed by Dr. Davis in this report. He merely stated that "Because this happened at work, she will try to get this covered under Workmen's Compensation." *Id*.

15. On March 23, 2022, Claimant returned to Dr. Davis. *Id*. at 104. Claimant reported she was working full duty. *Id*. at 105. Claimant also reported that the initial injury "occurred at work months ago." *Id*.

16. A Rule 16 Independent Medical Examination (IME) was performed by Dr. Mark Failinger at Respondents' request on March 3, 2022. RHE L at 107. Dr. Failinger performed a comprehensive review of Claimant's medical records and performed an examination. *Id*. Dr. Failinger concluded that the request for a repair, rotator cuff; arthroscopy, shoulder with Biceps Tenodesis for the right shoulder was unrelated to the July 10, 2020, incident. *Id*. Respondents denied the request for surgery on March 25, 2022, per Rule 16, WCRP. *Id*.

17. Dr. Failinger concluded that "[a]ccording to the records, and according to the clinic note by Hannah Bodkin, PA-C, on 8-25-2020, the patient had full range of motion with normal strength and had significant improvement in her symptoms. There was a recommendation that the patient finish out her physical therapy sessions to ensure she had a reasonable home therapy program. The patient did not return…for an entire year. With the resolution of the initial symptoms within six weeks after an initial fall, it is with reasonable medical probability that the patient sustained a shoulder sprain only, and it is unlikely that she sustained any significant tearing nor acceleration of previous rotator cuff pathology. That is to say, it is not with reasonable medical probability that she sustained an initial tearing of the rotator cuff in the right shoulder in the fall of 07-10-2020. *Id*. at 120.

18. Dr. Failinger further concluded that "it would not be medically probable that the patient's symptoms would essentially completely resolve, with full shoulder range of motion and full strength, within six weeks following the incident if, in fact, further acceleration of rotator cuff pathology occurred." *Id*. at 120. Moreover, Dr. Failinger explained "[h]er resolution of symptoms are most reasonably explained by a sprain of the structures of the shoulder, and it is not medically probable that tearing of the rotator cuff occurred at the work incident of 07-10-2020, or it would be unlikely the patient would have had resolution of symptoms in such a quick post incident timeframe." *Id*.

19. Dr. Failinger also indicated that when he examined Claimant's left shoulder to test abduction and strength, at best it exhibited 4/5 abduction strength. *Id*. at 121. This indicates and supports "the ongoing nature of a rotator cuff degenerative tearing and disease, and it is with medical probability that she has a tear in the left rotator cuff as well, despite no symptoms." *Id*.

20. Dr. Failinger opined that Claimant's "right shoulder symptoms likely resumed in the summer of 2021 causing her to seek further treatment for the right shoulder. Those recurrent symptoms were not reasonably due to pathology created in the work incident of 07-10-2020, but rather due to ongoing degeneration, with a recurrent flare of symptoms." *Id*.

Testimony of Dr. Failinger

21. Dr. Failinger is a Colorado licensed physician with Level II accreditation by the Colorado Department of Labor. Dr. Failinger is also board certified in orthopedic surgery and sports medicine. Dr. Failinger routinely performs causation assessments in compliance with his Level II accreditation. Dr. Failinger was admitted as an expert witness in orthopedic surgery and sports medicine, and as a Level II accredited physician. Tr. at 36-37.

22. Dr. Failinger testified that Claimant was diagnosed with a right shoulder strain as a result of the July 10, 2020, incident. Tr. at 38. Dr. Failinger testified that his diagnosis was appropriate based on the reported mechanism of injury, a fall to the knees with only a contusion sustained to the right shoulder. *Id*. Dr. Failinger testified that the forces of the fall would be absorbed by the knees. *Id*. *see also* Tr. at 42. Dr. Failinger

testified that he could not identify a mechanism of injury for the right shoulder to support a torn rotator cuff. *Id*.

23. Dr. Failinger credibly and persuasively testified that Claimant's injury was more consistent with a sprain based on her improvement in physical therapy and that Claimant progressed through treatment as anticipated for a strain, which is resolution within approximately six weeks as compared to a tear. *Id*. Dr. Failinger testified Claimant reached full range of motion in the right shoulder within four weeks, and only exhibited minimal tenderness. *Id*. Dr. Failinger testified that Claimant returned to full duty as well. *Id*.

24. Most importantly, Dr. Failinger credibly and persuasively testified that the sequence of events as reported by Claimant with a very high probability was a sprain, "meaning if you had actually torn the rotator cuff and there's a small partial tear noted later on the MRI a year later, she would not reasonably have been able to recover that quickly. She would not reasonably be able to go back to a job of lifting up to…70 pounds based on her previous work position. But even 10, 20 pounds and reaching shoulder level or above, there would have been persistent pain and symptoms that wouldn't have resolved in four weeks, much less fully resolved at six weeks." Tr. at 40.

25. Dr. Failinger testified that it is extremely difficult to tear a rotator cuff. Tr. at 42. Dr. Failinger testified that a healthy rotator cuff is difficult to tear, and that ligaments and bones would tear and or break prior to tearing a rotator cuff. *Id*. Dr. Failinger, however, testified that that is relatively easy to tear a diseased or partially torn rotator cuff. *Id*.

26. Dr. Failinger testified that Claimant's August 2021 MRI of the right shoulder revealed chronic findings. Tr. at 45. Specifically, Dr. Failinger testified that the MRI revealed degeneration in acromioclavicular joint and fraying/degenerative findings of the labrum. *Id*. Dr. Failinger further testified that Claimant sustained only a partial tear of the rotator cuff. Tr. at 45, *51*.

27. Dr. Failinger credibly testified that it is not medically probable that the Claimant tore her rotator cuff as a result of July 10, 2020, incident. Tr. at 48.

28. Dr. Failinger credibly testified that is not medically probable that the Claimant sustained an aggravation or acceleration of a preexisting rotator cuff pathology as a result of the July 10, 2020, incident based on the early resolution of her symptoms. Tr. at 48-49.

29. Dr. Failinger credibly testified that based on a reasonable degree of medical probability the Claimant's current symptoms are not the result of the July 10, 2020, incident. Tr. at 49. Dr. Failinger testified that Claimant's symptoms are the classical presentation of rotator cuff disease. *Id*.

30. Dr. Failinger credibly testified that when an acute injury occurs to a rotator cuff, symptoms do not occur and then hide for years. Tr. at 49. Dr. Failinger testified that the symptoms from an acute injury would persist for months after the event – which they did not in this case. Tr. at 50. Dr. Failinger further testified that it would be difficult for an individual to lift items of approximately 10-15 pounds from chest level and above if they had a torn rotator cuff. *Id*.

31. Dr. Failinger also testified that cumulative trauma to the right shoulder would not be related to the July 20, 2020, incident. Tr. at 62.

32. Dr. Failinger testified that Claimant reached MMI on August 25, 2020, with full strength, full range of motion, and full function as documented in the report. Tr. at 63.

33. Dr. Failinger credibly and persuasively testified that the surgery recommended by Dr. Davis is unrelated to the July 10, 2020, incident.

Testimony of Claimant

34. Claimant returned to full duty employment after being placed at MMI on August 25, 2020. Tr. at 12. Claimant did not continue with any physical therapy after being placed at MMI because she was unaware of the recommendation. Tr. at 13.

35. Claimant kept working after being placed at MMI until the present. Tr. at 19.

36. Claimant tripped over plastic binding on the floor causing her to fall onto her knees and on top of the large box she was carrying on July 10, 2020. Tr. at 20. When she fell, the box went into her pit area of the right shoulder. *Id*. at 21.

37. During her treatment at Concentra, Claimant worked in a modified capacity. Tr. at 22. In such capacity, she was not lifting as much, and instead was doing more computer work. *Id*. at 22-23.

38. After being placed at MMI, released to full duty, and working full duty, Claimant was still required to, and did, lift packages that weighed between 10 and 30 pounds without assistance. Claimant also had to lift packages that weighed 40 pounds, but did so with assistance. She was also able to maneuver packages that weighed 70 pounds. *Id*. Claimant did this without seeking medical treatment for her left shoulder until almost one year after being placed at MMI, when she sought treatment for her right shoulder in July 2021. *Id*. at 28.

Ultimate Findings of Fact

39. Claimant suffered a compensable shoulder strain on July 10, 2020. Claimant underwent conservative treatment and her condition improved. Due to the improvement of her condition, Claimant was returned to full duty and placed at MMI on August 25, 2020.

40. After being placed at MMI, Claimant returned to work and worked full duty. Claimant kept working full duty without seeking medical treatment until July 2021, when she had an increase in shoulder symptoms.

41. Claimant's July 10, 2020, injury did not leave Claimant's shoulder in a weakened condition. Thus, the need for additional medical treatment is not a compensable consequence of the industrial injury.

42. Claimant's increase in shoulder symptoms, which occurred after being placed at MMI, are unrelated to her July 10, 2020, work injury – a shoulder strain.

43. Claimant's July 10, 2020, work injury - shoulder strain - has not worsened.

44. Claimant's right shoulder symptoms, that developed after being placed at MMI, are not causally related to her July 10, 2020, work injury.

45. Claimant's rotator cuff tear, for which surgery has been recommended, is a distinct condition that is unrelated to her shoulder strain.

46. Claimant's need for medical treatment is not causally related to her July 10, 2020, work injury.

47. Claimant's need for shoulder surgery is not causally related to her July 10, 2020, work injury.

CONCLUSIONS OF LAW

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

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

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

CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant proved by a preponderance of the evidence that she suffered a worsening of condition sufficient to reopen her claim for benefits.

Section 8-43-303(1), C.R.S., provides that an award may be reopened on the ground of, *inter alia*, change in condition. The claimant shoulders the burden of proving his condition has changed and her entitlement to benefits by a preponderance of the evidence. Section 8-43-201; *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Osborne v. Industrial Commission*, 725 P.2d 63 (Colo. App. 1986). A change in condition refers either to change in the condition of the original compensable injury or to a change in the claimant's physical or mental condition that can be causally related to the original injury. *Heinicke v. Industrial Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008); *Chavez v. Industrial Commission,* 714 P.2d 1328 (Colo. App. 1985). Reopening is warranted if the claimant proves that additional medical treatment or disability benefits are warranted. *Richards v. Industrial Claim Appeals Office,* 996 P.2d 756 (Colo. App. 2000); *Dorman v. B & W Construction Co.,* 765 P.2d 1033 (Colo. App. 1988).

Colorado recognizes the "chain of causation" analysis holding that results flowing proximately and naturally from an industrial injury are considered to be compensable consequences of the injury. Thus, if the industrial injury leaves the body in a weakened condition and the weakened condition plays a causative role in producing additional disability or the need for additional treatment such disability and need for treatment represent compensable consequences of the industrial injury. *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970); *Jarosinski v. Industrial Claim Appeals Office,* 62 P.3d 1082 (Colo. App. 2002); *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). However, no compensability exists if the disability and need for treatment were caused as a direct result of an independent intervening cause. *Owens v. Industrial Claim Appeals Office,* 49 P.3d 1187 (Colo. App. 2002).

The question of whether the claimant met the burden of proof to establish a causal relationship between the industrial injury and the worsened condition is one of fact for determination by the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *City of Durango v. Dunagan, supra.* Similarly, the question of whether the disability and need for treatment were caused by the industrial injury or by an intervening cause is a question of fact. *Owens v. Industrial Claim Appeals Office, supra.*

Reopening of the claim is unwarranted as Claimant's current complaints and conditions are not causally connected to the July 10, 2020, incident. At the time of MMI, Claimant exhibited full range of motion and strength in the right upper extremity. Claimant returned to full duty employment and testified that she was capable of lifting packages up to 30 pounds and able to maneuver packages weighing 70 pounds. Dr. Failinger credibly testified that the Claimant's symptoms resolved as expected for a strain type injury within about six weeks. Dr. Failinger testified that if an acute injury to the rotator cuff occurred,

the Claimant would be unable to return to full duty employment. Dr. Failinger credibly testified that if an individual has a torn rotator cuff it would be difficult to even lift to shoulder level and above packages weighing even 10 pounds. Claimant continues to work full duty and continues to lift packages weighing up to 30 pounds.

Dr. Failinger credibly testified that the mechanism of injury as reported by Claimant regarding the July 10, 2020, incident based on a reasonable degree of medical probability would not create a rotator cuff tear.

Claimant failed to establish a change in her shoulder condition, a sprain, since reaching MMI on August 25, 2020. As found, the rotator cuff tear is a distinct and unrelated condition for which surgery has been recommended.

Claimant desires reopening for additional treatment for the right shoulder because her symptoms increased about one year after being placed at MMI. Dr. Failinger credibly and persuasively opined and testified that Claimant's symptoms result from degeneration which naturally occurs with rotator cuff disease and not the shoulder strain that occurred in July 2020. This is evidenced by the lack of treatment for approximately one year after reaching an end point in treatment in August 2020.

Therefore, the ALJ finds and concludes that Claimant has failed to establish by a preponderance of the evidence that her July 10, 2020, work injury has worsened and that such worsening is causally related to her July 10, 2020, work injury.

II. Whether Claimant proved by a preponderance of the evidence that the requested right shoulder surgery proposed by Craig Davis, M.D., is reasonable, necessary, and related to the July 10, 2020, work injury.

Respondents are liable only for those medical benefits which are reasonable and necessary to cure and relieve the effects of the industrial injury. § 8-42-101(1)(a), C.R.S.; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *City of Durango v. Dunagan*, 939 P.2d (Colo. App. 1997). The record must distinctly reflect the medical necessity of any medical treatment needed to cure and relieve an injured employee from the effects of the industrial injury and any ancillary service, care, or treatment as designed to cure and relieve the effects of such industrial injury. *Public Service Co. of Colorado v. Industrial Claim Appeals Office of State of Colo.*, 797 P.2d 584 (Colo. App. 1999). The question of whether medical treatment is reasonable and necessary is one of fact for determination by an ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002); *Wal-Mart Stores, Inc. v. Industrial Claims* Office, 989 P.2d 251 (Colo. App. 1999).

Treatment for a work injury must not only be reasonable and necessary but must also be causally related to that injury. *Lerner v. Wal-Mart Stores, Inc*., 865 P.2d 915 (Colo. App. 1993). Respondents are permitted to challenge causation and relatedness of the need for any treatment, despite having admitted liability for a claim. *Hanna v. Print Expediters, Inc*. 77 P.3d 863 (Colo. App. 2003); *Snyder v. Industrial Claim Appeals Office of the State of Colo*., 942 P.2d 1337 (Colo. App. 1997). In a dispute over medical benefits that arises after filing an admission of liability, Respondents may assert, based upon subsequent medical reports, that workers' compensation claimant did not establish a

threshold requirement of direct causal relationship between the on-the-job injury and need for medical treatment. *Snyder v. Industrial Claim Appeals Office of the State of Colo., supra*. Claimant bears the burden to prove a causal connection exists between a particular treatment and the industrial injury. *Id*.; *see also Grover v. Industrial Commission of Colorado*, 759 P.2d 705 (Colo. 1988). Causation is a question of fact for resolution by the ALJ. *F.R. Orr Construction v. Rint*, 717 P.2d 965 (Colo. App. 1985).

Colorado recognizes the "chain of causation" analysis holding that results flowing proximately and naturally from an industrial injury are considered to be compensable consequences of the injury. Thus, if the industrial injury leaves the body in a weakened condition and the weakened condition plays a causative role in producing additional disability or the need for additional treatment such disability and need for treatment represent compensable consequences of the industrial injury. *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970); *Jarosinski v. Industrial Claim Appeals Office,* 62 P.3d 1082 (Colo. App. 2002); *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). However, no compensability exists if the disability and need for treatment were caused as a direct result of an independent intervening cause. *Owens v. Industrial Claim Appeals Office,* 49 P.3d 1187 (Colo. App. 2002).

In this case, Claimant failed to establish by a preponderance of the evidence a causal connection supporting the relatedness of the request for surgery from Dr. Davis to the July 10, 2020, work incident, when she suffered a shoulder strain. It was not until Claimant was diagnosed with a partial tear to the rotator cuff one-year post MMI that Claimant required surgery. Dr. Failinger credibly and persuasively testified that Claimant did not sustain a rotator cuff tear as a result of the July 10, 2020, work incident based on the mechanism of injury. Nor did the Claimant sustain an aggravation of preexisting rotator cuff disease as a result of the July 10, 2020, work incident. This is evidenced by the Claimant's ability to return to full duty employment after being placed at MMI in August 2020. Although the requested procedure may be medically necessary, it is unrelated to the July 10, 2020, work incident. In the end, Dr. Failinger credibly and persuasively concluded that the proposed surgery is due to the degenerative process of the shoulder, and not the original work injury.

The ALJ further finds and concludes that Claimant's July 10, 2020, work injury did not result in Claimant being in a weakened condition and more susceptible to a rotator cuff tear for which surgery has been recommended.

As a result, the ALJ finds and concludes that Claimant failed to establish by a preponderance of the evidence that the need for shoulder surgery is causally related to her July 10, 2020 work injury.

ORDER

1. Claimant failed to sustain her burden of proof that she suffered a worsening of condition sufficient to reopen her claim for benefits for the right shoulder and the Petition to Reopen is DENIED.

2. Claimant failed to sustain her burden of proof that the right shoulder surgery

requested by Dr. Craig Davis is reasonably necessary and related to the July 10, 2020, work injury and the procedure is DENIED.

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

DATED: September 2, 2022

/s/ Glen Goldman

_____

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

ISSUES

➢ Whether Respondents have proven by a preponderance of the evidence that Claimant willfully failed to obey a reasonable safety rule adopted by Employer for the safety of the employees?

FINDINGS OF FACT

1. Claimant was employed with Employer as a driver. Claimant sustained injuries arising out of and in the course and scope of his employment on December 20, 2021 when he approached a commercial customer to empty the trash container and noticed the enclosure containing the trash container had extra debris which Claimant testified was wooden pallets, hanging out of the container and in front of the container. Claimant testified he needed to stop the vehicle and move the debris before he could empty the container.

2. Claimant exited the truck and proceeded to the area between the truck and the garbage container when the truck rolled forward and pinned Claimant between the truck and the garbage container. Video of the accident from the truck was entered into evidence at hearing.

3. Claimant testified he recalls that he exited the vehicle, and was removing the debris when he heard the truck rev as if someone was in the vehicle. Claimant testified he then tried to make himself small and found himself trapped under the truck.

4. Claimant was taken by ambulance to the hospital where he was admitted and eventually air lifted to Denver for further treatment. Claimant remained in the hospital for six (6) weeks.

5. Claimant testified at hearing that he does not recall what caused the truck to roll forward. Claimant testified that when he got out of the truck, he went through his usual protocol when getting out of his truck. Claimant testified he has been employed with employer for 25 years and has used the truck he was driving on December 20, 2021 the majority of his time while employed by Employer. Claimant testified his typical protocol when exiting his vehicle is to stop, analyze the situation, apply the parking brake, take the truck out of gear, unlatch his safety belt, open the door and exit the vehicle with three points of contact.

6. Claimant testified he needs to keep a certain pace in order to complete his route during his work day. Claimant testified when he has to deal with extra debris, it takes extra time to service the route. Claimant testified he attempts to work as quickly, efficiently and safely as possible.

7. Claimant testified he had been written up for violating safety rules in the past, including one for backing into a parked vehicle in 2015 and for having food and drink in his truck in 2019. Claimant also testified he had been written up for using an electronic device while driving in May 2021. Claimant testified he was aware that he needs to set the parking brake when he gets out of the vehicle and is aware that he is to take the truck out of gear when getting out of the vehicle.

8. Respondents presented the testimony of TP[Redacted], the head technician for Employer. Mr. TP[Redacted] testified that on December 20, 2021 he proceed to the accident site after hearing of the accident. Mr. TP[Redacted] testified he climbed into the cab of the truck at the accident site and noted that the key was on and the lights for the truck were on. Mr. TP[Redacted] testified that the shift pad read 6 and 1 and the gear box showed that the truck was in 1st gear and the vehicle was on. Mr. TP[Redacted] testified that with the vehicle in question, if you turn off the vehicle, the truck automatically goes into neutral.

9. Mr. TP[Redacted] testified that Employer has a list of "life critical rules." A copy of the Employer's Operation and Safety Rules was entered into evidence at hearing. Operation and Safety Rule 1.21 provides that when leaving a vehicle unattended, the employee should always do the following: (1) Put the transmission in neutral; (2) Set the parking brake; (3) Shut off the ending and remove the key from the ignition; (4) Activate the battery disconnect.

10. Operation and Safety Rule 3.0 provides that an employee should "Always apply parking brakes when parking. Ensure parking brakes are holding the vehicle from moving before exiting the tuck. Do not use a hand control valve or work brake for parking. Do not use the parking brake to restrain a vehicle with the engine running and the transmission in a forward or reverse gear. Do not leave the vehicle's transmission in gear when parking."

11. Respondents presented the testimony of Adam Michener, an engineer with Delta V Forensic Engineering. Mr. Michener testified as an expert in forensic engineering and accident reconstruction. Mr. Michener testified he was provided videos from the truck and examined the truck and visited the accident site in connection with his accident reconstruction report that was entered into evidence.

12. Mr. Michener testified that it was his conclusion that Claimant did not put the truck and neutral and did not engage the parking brake when he exited the vehicle. Mr. Michener testified the truck was on a slight incline at the accident site, so if the truck was in neutral, the truck would have rolled backwards. Mr. Michener testified that if the parking brake had been applied, it would have been sufficient to sop the vehicle from rolling forward.

13. Mr. Michener testified he did not interview Claimant of any other witnesses to the accident in preparing his report. Mr. Michener testified he did not have an opinion as to whether the accident was intentional or accidental.

14. Respondents presented the testimony of TS[Redacted], the District Operations Manager for Employer. Mr. TS[Redacted] testified Employer offers safety training at least once per week and additional safety meetings if necessary. Mr. TS[Redacted] testified Employer holds "life critical rules" as being the most critical rules for employees because these rules are based on fatalities that have occurred on the job.

15. Mr. TS[Redacted] testified that Claimant had previously been written up on May 21, 2021 for a violation of a "life critical rule" for using an electronic device while actively driving a commercial vehicle. Claimant was provided with a final written warning for this safety rule violation.

16. Mr. TS[Redacted] testified Claimant was subsequently provided with additional coaching on June 22, 2021 for issues with his following distance and another coaching session on September 27, 2021 for failing to come to a complete stop at an intersection.

17. Mr. TS[Redacted] testified that Claimant's actions in failing to put his vehicle in neutral and failing to set the parking brake violated "life critical rule #1 0" which states that employees should "always apply parking brakes when exiting a vehicle." Mr. TS[Redacted] further testified Claimant's actions violated Employer's safety rule 1.21 regarding unattended vehicles and rule 3.0 involving brakes and gauges.

18. The ALJ credits the testimony of Mr. Michener as being credible and persuasive as to the circumstances that occurred that caused the truck to roll forward and cause the injuries in this case and finds that Respondents have established that Claimant violated a safety rule set forth by the employer that resulted in Claimant sustaining injuries. Specifically, the ALJ finds that Respondents established by a preponderance of the evidence that Claimant failed to take the truck out of gear and apply the parking brake which resulted in the truck rolling forward and striking Claimant.

19. Claimant argued at hearing that there was insufficient evidence that Claimant's actions in this case were willful or that Claimant deliberately violated the Employer's safety rule. Claimant argues that while his actions may be negligent, they are not willful and therefore, the 50% reduction of benefits allowed pursuant to Section 8-42-112(1)(b) would be improper.

20. Respondents argued at hearing that Claimant had a history of violating safety rules in the past and noted that the safety rule violated by Claimant in this case was a "life critical rule" that is given special attention by Employer due to the importance of following these rules. The ALJ agrees that the evidence in this case establishes that it is more probable than not that Claimant's actions in getting out of the truck and failing to take the truck out of gear and set the parking break were willful.

21. The ALJ credits the evidence presented at hearing, including the testimony of Mr. TS[Redacted] regarding the instruction regarding the safety rules by Employer and finds that Respondents have established that it is more probable than not that Claimant willfully violated a reasonable safety rule set forth by the Employer when

he removed himself from the cab of his truck without taking the truck out of gear or setting the emergency brake.

22. The ALJ notes that the evidence in this case, which includes the testimony of Mr. Michener, establishes that Claimant violated at least two safety rules when he got out of the truck without setting the parking brake or taking the truck out of gear and finds that the actions of Claimant in getting out of the truck without following the appropriate procedure to ensure that the truck did not move while Claimant was out of the truck represents a willful action on Claimant's part.

23. The fact that Claimant needed to disregard multiple safety rules in order to leave the cab of the truck in a manner in which the truck was still able to roll forward and strike Claimant, this evidence demonstrates that the actions of Claimant was willful and not a result of mere carelessness, negligence, forgetfulness, remissness or oversight. The ALJ further finds that Claimant's history of violating safety rules, including his safety rule violation in May 2021 for using an electronic device while operating a vehicle is further evidence that Claimant's actions in this case were willful in nature and not the result of mere carelessness, negligence, forgetfulness, remissness or oversight.

24. Because the evidence establishes Claimant's injury resulted from actions where Claimant willfully failed to obey a reasonable safety rule adopted by Employer for the safety of employees, Respondents are entitled to reduce his non-medical benefits by 50% pursuant to Section 8-42-112(1)(b).

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2021. However, in cases in which an employer alleges a safety rule violation under Section 8-42-112(1)(b), the burden of proof rests with respondents to establish that claimant willfully violated a reasonable safety rule established by the employer. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and

actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. Respondents argue that Claimant's injury resulted from a willful violation of a safety rule. Section 8-42-112(1)(b), C.R.S. permits imposition of a fifty percent reduction in compensation in cases of an injured worker's "willful failure to obey any reasonable rule" adopted by the employer for the employee's safety. The term "willful" connotes deliberate intent, and mere carelessness, negligence, forgetfulness, remissness or oversight does not satisfy the statutory standard. *Bennett Properties Co. v. Industrial Commission*, 165 Colo. 135, 437 P.2d 548 (1968).

4. The respondents bear the burden of proof to establish that the claimant's conduct was willful. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office*, 907 P.2d 715 (Colo. App. 1995). The question of whether the respondent carried the burden of proof was one of fact for determination by the ALJ. *City of Las Animas v. Maupin*, 804 P.2d 285 (Colo. App. 1990). The claimant's conduct is "willful" if he intentionally does the forbidden act, and it is not necessary for the respondent to prove that the claimant had the rule "in mind" and determined to break it. *Bennett Properties Co. v. Industrial Commission, supra; see also, Sayers v. American Janitorial Service, Inc.*, 162 Colo. 292, 425 P.2d 693 (1967) (willful misconduct may be established by showing a conscious indifference to the perpetration of a wrong, or a reckless disregard of the employee's duty to his employer). Moreover, there is no requirement that the respondent produce direct evidence of the claimant's state of mind. To the contrary, willful conduct may be inferred from circumstantial evidence including the frequency of warnings, the obviousness of the danger, and the extent to which it may be said that the claimant's actions were the result of deliberate conduct rather than carelessness or casual negligence. *Bennett Properties Co. v. Industrial Commission, supra; Industrial Commission v. Golden Cycle Corp.*, 126 Colo. 68, 246 P.2d 902 (1952). Indeed, it is a rare case where the claimant admits that her conduct was the product of a willful violation of the employer's rule.

5. As found, the testimony of Mr. Michener is found to be credible and persuasive that the injury in this case resulted from Claimant's failure to take the vehicle out of gear and apply the parking brake when he removed himself from the vehicle. As found, Claimant's failure to take the truck out of gear and apply the parking break resulted in the truck proceeding forward where Claimant had positioned himself to remove the pallets, and resulted in the truck striking Claimant and trapping Claimant between the truck and the garbage container. The ALJ credits the testimony of Mr. TS[Redacted] that Employer established the "life critical rules" for the purpose of protecting employees as these safety rules had been developed after accidents that had led to deaths. Therefore, Respondents have proven by a preponderance of the evidence that Claimant's failure to obey a reasonable safety rule that was established for the safety of the employees resulted in Claimant's injury.

6. As found, the ALJ credits the testimony of Mr. TS[Redacted], which was corroborated by Claimant's testimony and finds that Claimant had a history of safety rule violations which included a violation of a "life critical rule" in May 2021. As found, the evidence establishes by a preponderance of the evidence that Claimant's actions on December 20, 2021 in which he got out of the cab of the truck without taking the truck out of gear or setting the parking break represented a willful violation of Employer's safety rule.

7. Because Respondents have established that Claimant's injury resulted from a willful violation of a safety rule established by Employer for the safety of employees, Respondents are allowed a 50% reduction of non-medical benefits pursuant to Section 8-42-112(1)(b).

ORDER

It is therefore ordered that:

1. Respondents are allowed a 50% reduction of non-medical benefits pursuant to Section 8-42-112(1)(b).

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

DATED: September 2, 2022

Keith E. Mottram

Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that her need for a left shoulder arthroscopic rotator cuff repair, subacromial decompression, biceps tenodesis and posterior labral repair surgery, is causally related to her August 6, 2020 work-related fall.

FINDINGS OF FACT

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

1. Claimant sustained an admitted injury to her left shoulder on August 6, 2020. Claimant explained that a bucket placed under a leaking drinking fountain overflowed, spilling water onto a concrete floor, which caused her to slip and fall onto her left shoulder.

2. Claimant reported her fall immediately. She was given a choice of authorized providers to attend to her injuries. She chose to treat with the providers at Centura Centers for Occupational Medicine (CCOM). Claimant was initially evaluated by Nurse Practitioner (NP) Brendon Madrid at CCOM on August 7, 2020 – the day after her fall.

3. During Claimant's initial evaluation at CCOM, she completed a pain diagram endorsing aching pain on the right side of her head, the left side of her neck, the left shoulder, left hip and buttock, left calf, left lower arm, left wrist, left hand, chest, and mid and lower back. NP Madrid diagnosed Claimant with strains, including a left shoulder strain, placed her on modified duty, and prescribed over-the-counter (OTC) Tylenol.

4. Claimant returned to CCOM for a follow-up appointment on August 12, 2020. During this appointment, Claimant reported that the sitting associated with her modified duty was aggravating her pain. She requested a trial of full duty work so she could move about a bit more. NP Madrid released Claimant to full duty work without restriction.

5. Claimant testified that the week after the fall, her shoulder pain was "not [in] a pinpoint spot, it's a generalized spot when it hurt. . . I mean, it hurts along the back in the back muscles, but it ties into the shoulder." (Hrg. Tr., p. 21:18-20).

6. Claimant continued working without restriction and returned to CCOM on August 18, 2020. During this encounter, Claimant reported tightness in her mid-back and neck. She also complained of headaches but denied any numbness or tingling

radiating down her arms. Physical examination was limited to the neck and shoulders, which revealed "tightness and tenderness to the musculature on the right and left side of the neck as well as the right and left trapezius muscles". Claimant was able to "interlock her fingers behind her head and behind her back without difficulty". (Resp. Ex. C, p. 21.) NP Madrid referred Claimant for three sessions of massage therapy and scheduled a follow-up appointment for August 25, 2020.

7. Claimant saw NP Madrid in follow-up on August 25, 2020 for what he documented as a neck strain, thoracic strain and low back strain. Claimant reported feeling "very tight" but denied any numbness or tingling down her upper or lower extremities. Physical examination was limited to the neck, thoracic and lumbar spine. NP Madrid added Meloxicam and Tizanidine to Claimant prescription medications and scheduled a follow-up visit for September 1, 2020.

8. Claimant testified generally that after her date of injury (DOI) the nature of her multiple body part pain changed in that it became less generalized and more focused. (Hr. Tr., p. 23:10-14).

9. Claimant returned to CCOM on September 1, 2020 where she was once again seen by NP Madrid who noted she was "in for follow-up visit status post neck strain, low back strain". (Resp. Ex. C, p. 26). Claimant continued to complain of 4/10 pain with "tightness to the musculature around the neck area and trapezius muscles bilaterally". *Id*. Examination of the shoulders was limited to a range of motion test for abduction against resistance. No other provocative testing maneuvers directed to the shoulder(s) were completed. (Resp. Ex. C, p. 27). NP Madrid noted he spent 50 minutes with Claimant with more than 50% of this time being spent in education with her on the plan of care, which included, completing massage therapy and continuing OTC Tylenol and her home stretching program. *Id.*

10. Claimant saw NP Madrid in follow-up on September 10, 2020. She reported 7/10 pain including stabbing pain in her neck, burning pain in the left thoracic area and aching pain in her low back and sciatic area. NP Madrid limited his physical examination to the neck, thoracic and lumbar spine. He discontinued massage therapy and ordered seven sessions of physical therapy. He also instructed Claimant to return to the clinic for a follow-up appointment. (Resp. Ex. C, p. 31).

11. Claimant saw NP Madrid on September 16, 2020. Claimant's reports of aching pain persisted and her examination was again limited to her neck, thoracic and lumbar spine. X-rays of the cervical, thoracic and lumbar spine were obtained and demonstrated no acute findings. A follow-up appointment was made.

12. After seven appointments with NP Madrid and approximately 2 months after her August 6, 2020 slip and fall, Claimant had her first appointment with Dr. Centi on October 1, 2020. Dr. Centi noted that Claimant's primary problem continued to be focused on her cervical and lumbar strains. He documented that there was "no other arm or leg involvement". He noted no abrasions, bruising, erythema, swelling rashes or

wounds on the upper extremities. He also indicated that there was no pain with palpation to the upper extremities. He recommended continued prescriptions/physical therapy and ordered a TENS unit.

13. On October 15, 2020, Claimant returned to Dr. Centi who documented that Claimant's primary problem is "F/U cervical and lumbar strain, neck is still stiff and sore. . ." (Resp. Ex. C, p. 42).

14. On October 27, 2020, Claimant's pain diagram specifically documented aching in the posterior aspect of the left shoulder. (Resp. Ex. C, p. 49). Despite this Dr. Centi's October 27, 2020, medical report is largely unchanged from his previous reports of October 1, and 15, 2020. While Dr. Centi may have visually inspected the upper extremities for abrasions, bruising, redness, swelling, rashes and wounds, careful review of the October 1st, 15th and 27th, 2020 reports fails to document any indication that a physical examination was directed to the left shoulder. (resp. Ex. C, pp. 38-49).

15. Between October 1, 2020, when Claimant saw Dr. Centi for the first time and October 27, 2020, when she clearly depicted in her pain diagram that she was having posterior left shoulder pain, Claimant was participating in physical therapy (PT). (Resp. Ex. F). PT treatments were focused on Claimant's cervical and lumbar spine; however, on October 26, 2020, one day before her 10/27/20 appointment with Dr. Centi, she reported that her left shoulder had "been *more* sore", suggesting that she had previous symptoms in the left shoulder. (Resp. Ex. F, p. 99) (emphasis added).

16. Claimant returned to NP Madrid for a follow-up visit on November 5, 2020. During this encounter, Claimant reported she had experienced "discomfort in her left shoulder when she was lying on her stomach on her phone". (Resp. Ex. C, p. 50). Despite her complaint of left shoulder pain, the physical examination directed to the shoulders by NP Madrid consisted of performing one provocative testing maneuver, i.e. testing Claimant's range of motion to 90 degrees of abduction against resistance. (Empty Can Test). *Id.* No other provocative examination testing focused to the left shoulder was completed. Indeed, outside of testing Claimant's shoulder abduction, the remaining physical examination findings documented in the November 5, 2020 report by NP Madrid concerning Claimant's shoulders amounts to a recitation of what was previously recorded by Dr. Centi, namely that there was no bruising, erythema, wounds or swelling in the upper extremities.

17. Claimant returned to Dr. Centi in follow-up on November 19, 2020. As part of her examination, Claimant completed a pain diagram, which clearly depicted aching pain in the posterior left shoulder. In the examination section of his November 19, 2020 report, Dr. Centi simply reiterated the upper extremity findings originally documented in his October 1, 2020 report, i.e. there was no bruising, erythema, or swelling present in the left upper extremity and no pain to palpation of the left upper arm. (Resp. Ex. C, p. 55). Despite Claimant clearly indicating that she had aching pain in the posterior aspect of the left shoulder, Dr. Centi performed no meaningful shoulder

examination or provocative testing. Instead, he placed Claimant at maximum medical improvement (MMI) on 11/19/2020.[1]

18. Claimant testified that once she was placed at MMI by Dr. Centi her access to treatment was terminated. (Hrg. Tr., p. 24:6-9). Claimant testified that her neck, back, left hip and left shoulder were still painful at the time of MMI and she did not agree with her release from care. *Id.* at pp. 23:21-25; 24:1-5. Consequently, Claimant attempted to treat with her primary care provider (PCP) at Paladina Health. (Resp. Ex. G).

19. On February 17, 2021, Claimant presented to NP Jennifer Becker with Paladina Health for additional treatment. NP Becker informed Claimant that because her treatment was necessitated by a workers' compensation injury she could not assume care. (Resp. Ex. G, p. 121). NP Becker advised Claimant to discuss reopening her case with Broadspire or pursue an independent medical examination. *Id.*

20. Claimant requested a Division Independent Medical Examination (DIME) and Dr. Matthew Brodie completed the same on August 2, 2021. During her DIME appointment, Claimant reported that she slipped and fell on water at work, landing on her left shoulder and hip. (Resp. Ex. H, p. 129). She reported that she developed "back pain, neck pain, left shoulder pain and left hip pain". *Id.* Dr. Brodie documented that Claimant treated under the workers' compensation system but did not undergo any surgical intervention and was released at MMI "following conservative care on November 19, 2020 with 0% impairment, no work restrictions, no maintenance treatment, and no medical follow-up". *Id.*

21. Dr. Brodie reviewed Claimant's medical records that documented a several year history of right, as opposed to left shoulder pain resulting in diagnostic workup and subsequent arthroscopy. He noted further that Claimant had undergone nerve conduction testing of the upper extremities, which revealed bilateral sensory carpal tunnel syndrome, mild left ulnar neuropathy, chronic denervation in the bilateral triceps muscle, and possible bilateral C6-7 radiculopathy. He also noted that Claimant underwent an MRI of the cervical spine in 2012, which revealed arthritis at C5-6. (Resp. Ex. H, p. 131). In addition to her prior right shoulder, neck and upper extremity treatment, Claimant has also been diagnosed with and treated for degenerative joint disease (DJD) in both knees. *Id*. at pp. 131-132. As noted, there is no history of prior symptoms/complaints concerning the left shoulder. Nor is there any history of treatment directed to the left shoulder.

22. During her DIME, Claimant reported, "*Continued* left-sided neck and upper shoulder pain". (Resp. Ex. H, p. 134) (emphasis added). She was "unsure whether her left shoulder pain [was] independent of the neck and left upper shoulder girdle pain", but

[1] Although not provided as part of the exhibits admitted into evidence, Dr. Brodie references that he reviewed a WC 164 form as part of his medical records review during the DIME, which released Claimant at MMI with no impairment and no need for maintenance care. (Resp. Ex. H, p. 134).

felt that her neck and upper shoulder pain may be "interconnected" because she had pain in both areas simultaneously. *Id.*

23. Dr. Brodie's physical examination revealed pain localized diffusely in multiple regions of the left shoulder as well as reduced active range of motion in most planes. Provocative testing was performed and noted to be "[e]quivocal/unreliable but potentially positive" for drop arm testing, empty can sign, crossed arm/chest sign and shoulder impingement testing. (Resp. Ex. H, p. 136).

24. Dr. Brodie diagnosed Claimant with left shoulder pain of unclear etiology. According to Dr. Brodie, "[d]iagnostic considerations [included] intrinsic disorder of the left shoulder [and] myofascial pain. (Resp. Ex. H, p. 136). He noted that Claimant had a new onset of left shoulder symptomology that [had] not been sufficiently evaluated". Consequently, Dr. Brodie opined that Claimant was not at MMI. *Id*. at pp. 136-137. Dr. Brodie recommended "additional diagnostic testing, and specialist evaluations . . . prior to reconsideration for the assignment of maximum medical improvement". *Id*. at p. 138. Specifically, Dr. Brodie recommended that Claimant proceed with an orthopedic shoulder surgical consultation along with further diagnostic testing to include injections, MRI and MR arthrogram.

25. Following Dr. Brodie's DIME, Claimant began treatment at Concentra Medical Centers (Concentra) under the direction of Dr. Douglas Bradley. (Resp. Ex. I). On September 9, 2021, Dr. Bradley noted that he had reviewed Dr. Brodie's DIME report. He noted further that the claim had been "reopened" for an evaluation of Claimant's "neck, left wrist, left shoulder, low back and left hip". (Resp. Ex. I, p. 144). On September 20, 2021, Dr. Bradley referred Claimant to Dr. Jennifer Fitzpatrick for an orthopedic evaluation of her left shoulder. *Id*. at p. 149. Claimant was also referred for an MRI, without contrast on October 4, 2021 by Concentra NP Jennifer Livingston. *Id*. at p. 154.

26. Claimant underwent a left shoulder MRI without contrast on October 25, 2021. This imaging revealed tendinitis of the supraspinatus tendon, a 20% under surface partial tear of the anterior leading edge of the supraspinatus tendon of unknown age, arthrosis of the acromio-clavicular joint, mild subacromial-subdeltoid bursitis and a suspected tear in the posterior labrum for which MR arthrography was recommended. (Resp. Ex. L, p. 269).

27. Claimant presented to the offices of Dr. Fitzpatrick on November 1, 2021 for review of her left shoulder MRI results. (Resp. Ex. J, p. 225). During this encounter, Claimant reported anterior lateral left shoulder pain and pain with reaching overhead and behind her back. *Id*. Physical examination of the left shoulder revealed positive provocative testing, including a positive speeds test. Dr. Fitzpatrick successfully administered 40 mg of Kenalog mixed with 6 cc of 0.5% Marcaine to the posterior glenohumeral joint (GHJ) of the left shoulder. *Id.* at. pp. 226-227. Claimant was instructed to return to the clinic in six weeks for a follow-up. *Id.* at p. 227.

28. Claimant returned to Dr. Fitzpatrick on December 13, 2021. Dr. Fitzpatrick documented that Claimant had experienced no relief in her left shoulder symptoms after "conservative treatments of PT (physical therapy), HEP (home exercise program), injections, OTC anti-inflammatories, Rx anti-inflammatories and activity modification". (Resp. Ex. J, p. 229). She requested an MRI arthrogram to evaluate for a labral tear. *Id.*

29. Claimant had an MRI Arthrogram of the left shoulder on December 23, 2021. The results of this imaging demonstrated anterior and superior rotator cuff tendinopathy, a full thickness, partial width tear to the ventral aspect of the supraspinatus tendon, a partial thickness tear involving the joint surface of the subscapularis tendon, moderate degenerative changes of the AC joint and degenerative tearing involving the posterior and inferior aspects of the labrum. (Resp. Ex. L, pp. 271-272).

30. On January 14, 2022, NP Debra Anshutz evaluated Claimant during a follow-up appointment at Concentra. (Resp. Ex. I, p. 187). Claimant reported that her left shoulder symptoms were worsening. She reported 5-6/10 pain. *Id*. Shoulder flexion was limited to 95 degrees otherwise. *Id.* at p. 188. Claimant expressed frustration in obtaining "insurance approvals and delayed treatments". *Id*. at p. 190.

31. Claimant returned to Dr. Fitzpatrick in follow-up on January 19, 2022 to discuss the results of her MRI arthrogram. (Resp. Ex. J, p. 231). During this appointment, Claimant reported continued pain with reaching overhead and behind her back. *Id.* Active left shoulder range of motion was limited to 100 degrees of forward flexion and 50 degrees of external rotation. *Id*. at p. 132. Dr. Fitzpatrick recommended an "arthroscopic rotator cuff repair with evaluation of the biceps tendon that is in the concurrent space [along] with a subacromial decompression".[2] *Id*. at p. 233.

32. Respondents requested a Workers' Compensation Rule 16 peer review of Dr. Fitzpatrick's request for authorization to proceed with left shoulder surgery. (Resp. Ex. A). Dr. Jon Erickson completed the requested Rule 16 review on February 3, 2022. As part of his review, Dr. Erickson was asked whether Claimant's rotator cuff pathology could be caused by Claimant's described mechanism of injury (MOI). Dr. Erickson responded as follows:

> An obese individual slipping on a wet floor and landing on their left side could certainly cause enough force to cause a rotator cuff tear.[3]

[2] The ALJ finds Dr. Fitzpatrick's reference to the MR arthrogram being performed on the right shoulder a likely typographical error since Claimant has never reported symptoms in the right shoulder since her August 6, 2020 slip and fall and there is no record supporting that imaging of the right shoulder has been performed during the pendency of this case. (*See* Hrg. Tr. p. 26:6-9).

[3] At the time of his Rule 16 review, Dr. Erickson documented Claimant's height at 5 feet 5 inches tall and her weight at 277 pounds. She had a BMI of 46.1, which places her in the obese weight category. (*See* Resp. Ex. C).

(Resp. Ex. A, p. 5).

33. While Dr. Erickson opined that the described MOI might be causative of Claimant's left shoulder rotator cuff tear, he concluded that the available documentation failed to support the existence of left shoulder complaints until "almost three months from the date of [Claimant's] injury. He also concluded that there had been "multiple normal examinations" of the left shoulder during that same period. (Resp. Ex. A, p. 5). Finally, Dr. Erickson noted that the delay (16 months from the date of injury) in completing the MR arthrogram eliminated the ability to determine the age of the left shoulder pathology. Although the rotator cuff tearing was age-indeterminate, Dr. Erickson opined that it was "most consistent with degeneration" and "part of the normal aging process".[4] *Id.*

34. Dr. Erickson concluded that while the recommended surgery may be "indicated", it was unrelated to Claimant's August 6, 2020 slip and fall. In support of his opinion, Dr. Erickson noted, "if [Claimant] had sustained a rotator cuff tear at the time of her fall on 8/6/2020, she most certainly would have mentioned her symptoms to her care providers". (Resp. Ex. A, p. 5). Accordingly, Dr. Erickson opined that the "damage" visualized on imaging, more likely than not, resulted from a "progressive degenerative process". *Id*.

35. Based upon Dr. Erickson's Rule 16 review, Respondents stood on their denial for prior authorization prompting Claimant to file an Application for Hearing on February 22, 2022. (Clmt's. Ex. 1, pp. 1-4).

36. On July 13, 2022, Claimant demonstrated active forward flexion of the left shoulder to 30 degrees with pain during a follow-up visit at Concentra with Dr. Kathryn Murray. (Clmt's. Ex. 3, p. 8). She also had active movement in abduction of the left shoulder to 100 degrees*. Id.* At hearing, Claimant demonstrated very limited active shoulder flexion during the hearing and she testified that her range of motion was progressively getting worse. She reported that while she could move her left arm to the side, she could not move it straight up in front of her body much. (Hrg. Tr. p. 26:16-25, 27:1). Based upon the evidence submitted, the ALJ finds Claimant's testimony regarding her worsening range of motion credible and persuasive. (*See supra*, ¶¶ 21, 28, 29).

37. Dr. Erickson testified as a Level II accredited expert in orthopedic surgery with significant experience treating shoulder conditions. During his testimony, Dr. Erickson reiterated his opinion that a traumatic injury to a rotator cuff causes significant pain either immediately or within the next couple of days – 24 to 48 hours. (Hrg. Tr., p. 36:21-25, 37:1-16). He testified that a traumatic tear to the shoulder would cause limitation in range of motion and loss of strength also occurring within a few days of the tear. *Id.* Consistent with Claimant's description of escalating symptoms, Dr. Erickson testified that the pain, the range of motion deficits, and the loss of strength associated

[4] Claimant was 48 years old when Dr. Erickson completed his Rule 16 review.

with a traumatic injury to the rotator cuff would progressively worsen over time. (Hrg. Tr., p. 52:7-11).

38. Focusing on the timeline for the development of rotator cuff tear symptoms and Claimant's pain diagrams, Dr. Erickson testified that there was "no justification for calling this, i.e. Claimant's left shoulder condition, a workers' comp injury from a fall on 8/6/2020". (Hrg. Tr. p. 38:7-14). Instead, Dr. Erickson reiterated his opinion that the "problem is more likely due to degenerative change". *Id*. at p. 38:7-11. In support of his opinion, Dr. Erickson testified that for a "period of literally almost three months", the record is devoid of any complaints of pain in the left shoulder and during this same period, no abnormalities were documented as part of the physical examination directed to the left shoulder. (Hrg. Tr., p. 38:1-5). Because the specific tests for determining the presence of a rotator cuff tear did not seem to be positive during examination and because her symptoms were exacerbated by cervical movements, Dr. Erickson suggested that the shoulder aching Claimant endorsed on her 8/7/2020, 10/27/2020 and 11/19/2020 pain diagrams probably represented radicular pain emanating from her neck rather than from a discrete tear to the rotator cuff. (Hrg. Tr., p. 54:5-20).

39. Claimant testified that she completed pain diagrams at the outset of all of her appointments at CCOM. (Hrg. Tr. p. 31:2-4). The record contains pain diagrams dated: 8/7/2020, 8/12/2020, 8/18/2020, 8/25/2020, 9/1/2020, 9/10/2020, 9/16/2020, 10/1/2020, 10/15/2020, 10/27/2020, 11/5/2020 and 11/19/2020. Of the 12 pain diagrams, Claimant clearly marked pain in the left shoulder in addition to pain in the cervical and upper thoracic spine on 8/7/2020, 10/27/2020 and 11/19/2020. Moreover, the pain diagrams dated 10/1/2020 and 11/5/2020 appear to depict aching pain in the upper and middle aspect of the left scapula/shoulder in addition to the cervical and thoracic spine.

40. The ALJ has carefully considered Dr. Erickson's opinions and has weighed them against the balance of the competing evidence, including Claimant's testimony and the medical records as a whole. In this case, the ALJ credits the testimony of Dr. Erickson to find that the described MOI, i.e. a hard fall to a concrete floor probably transferred sufficient force to the left shoulder to injure/tear the rotator cuff and aggravate an otherwise pre-existing, yet asymptomatic condition in Claimant's cervical spine. Nonetheless, Dr. Erickson's suggestion that the physical examinations directed to Claimant's left shoulder support a finding that her rotator cuff tear is degenerative in nature is unconvincing. Indeed, the medical records demonstrate the following regarding the quality and thoroughness of the physical examinations directed to Claimant's left shoulder by NP Madrid and Dr. Centi:

- On 8/7/2020, Claimant specifically reported pain in the left shoulder and depicted aching pain in the anterior aspect of the shoulder in her pain diagram. Nonetheless, the examination of the left shoulder was limited to a visual inspection of the boney prominences and single provocative maneuver, an Empty Can test. No other provocative testing was completed and no imaging of the shoulder was requested.

- On 8/12/2020 and 8/18/2020 a physical examination of the shoulder, limited to one provocative test, was performed suggesting that Claimant was reporting pain in the shoulder. No other provocative testing such as that completed during Claimant's DIME appointment with Dr. Brodie or her appointments with Dr. Fitzpatrick was performed despite left "arm" pain being included in Claimant's chief complaints. Again, no imaging of the shoulder was requested.

- The medical record from 8/25/2020 is devoid of any evidence that NP Madrid performed a physical examination of Claimant's left arm/shoulder.

- As part of Claimant's 9/1/2020 appointment, NP Madrid simply repeated the narrative he had documented from 8/7/2020 regarding the examination findings of the left shoulder. While it is possible that Claimant's shoulder abduction against resistance was 90 degrees again, it is unclear to the ALJ whether an actual examination was directed to the shoulder or whether the documentation concerning Claimant's empty can test result is a carryover from 8/7/2020. Regardless, even if NP performed an empty can test, he did not follow-up with additional provocative testing.

- The medical records from 9/10/2020 and 9/16/2020 demonstrate that NP Madrid did not perform an examination of the left shoulder. Rather, the examination and treatment focused on Claimant's cervical, thoracic and lumbar spine complaints. Even Centi failed to perform a thorough left shoulder examination on 10/1/2020. Indeed, the documentation from his examination supports a finding that provocative testing maneuvers to determine rotator cuff pathology were not performed. Rather, the entire examination of the left arm, per the 10/1/2020 report consists of the following passage: "An abrasion is not present. Bruising is not present. Erythema is not present. An open wound is not present. Pain to palpation is not present. A rash is not present. Swelling is not present". (Resp. Ex. C, p. 39). The ALJ finds that simple visual inspection and straightforward palpation is not a substitute for provocative maneuver testing to determine the integrity of the shoulder. Moreover, it is unlikely to catch any internal lesions involving the rotator cuff.

- On 10/15/2020, Dr. Centi simply copied his narrative examination findings from his 10/1/2020 report. Even after Claimant specifically documented posterior pain in the left shoulder on her 10/27/2020 pain diagram, Dr. Centi documented that Claimant's "primary problem is F/U cervical and lumbar strain, neck is still stiff and sore, hurts with motion . . ." (Resp. Ex. C, p. 46). Rather than performing a physical examination of the left shoulder on 10/27/2020, Dr. Centi elected to copy the physical examination findings he documented in his 10/15/2020 report to his 10/27/2020 report. Based upon the content of the 10/27/2020 report, the

ALJ finds it probable that Dr. Centi did not direct any examination to Claimant's left shoulder on 10/27/2020.

- On 11/5/2020, Claimant was evaluated by NP Madrid. Assuming that NP Madrid actually performed a physical examination directed to Claimant's left shoulder and did not simply carry over the findings from his previous examinations to his 11/5/2020 report, the examination again appears to be limited to one provocative test to determine the presence of lesions in the left shoulder.

- Claimant was evaluated by Dr. Centi on 11/19/2020. As referenced above, Claimant completed a pain diagram at the outset of this appointment. Despite clearly indicating that she was experiencing aching pain in the posterior aspect of the left shoulder, it appears that Dr. Centi failed to perform any provocative maneuver testing of Claimant's shoulder during this visit. Indeed, the physical examination findings from this visit appear simply to be a repeat of findings Dr. Centi documented in prior reports suggesting that he did not perform any examination directed to the left shoulder.

41. In stark contrast to the examinations performed by NP Madrid and Dr. Centi, the left shoulder examination performed by Dr. Brodie included not only a visual inspection and a palpatory exam, but also provocative testing to include a drop arm test, an empty can test, a crossed arm/chest test and an impingement (Hawkins) test. Because the results of these provocative tests were equivocal, but potentially positive, Dr. Brodie recommended imaging. Dr. Fitzpatrick also performed various provocative testing maneuvers during her examinations. Based upon the evidence presented, the ALJ finds the quality and thoroughness of NP Madrid's and Dr. Centi's shoulder examinations wanting. Accepting the records as an accurate picture of the examinations completed by NP Madrid and Dr. Centi supports a finding that on at least three occasions no examination of the left shoulder was performed. Moreover, at no time while Claimant was under their care did NP Madrid or Dr. Centi perform more than one provocative testing maneuver. Accordingly, the ALJ finds Dr. Erickson's reliance on Claimant's early examinations, as proof that the rotator cuff tear is degenerative, unconvincing. Had more thorough examinations of the left shoulder been performed and an earlier recommendation for imaging made, the ALJ finds it reasonable to conclude that Claimant's rotator cuff tear would, more probably than not, have been identified much earlier. Claimant is not responsible for the quality of her provider's examinations nor the delay in obtaining imaging to evaluate the integrity of the shoulder, a fact with which Dr. Erickson emphatically agreed. (Hrg. Tr., p. 67:11-18).

42. Dr. Erickson also relied on Claimant's completed pain diagrams as evidence that her left shoulder rotator cuff tear is degenerative in nature and unrelated to her August 6, 2020 slip and fall. Indeed, Dr. Erickson testified that because "there are no markings over the left shoulder, either anteriorly or posteriorly" on most of

Claimant's pain diagrams, she probably did not suffer a traumatic tear or injury to her shoulder during the 8/6/2020 fall. (Hrg. Tr., p. 39:11-25; 39:1-25 - 50:1-14).

43. On October 27, 2020, Claimant completed a pain diagram that Dr. Erickson agreed contained a "discrete" pain marking over the posterior aspect of the left shoulder. (Hrg. Tr., p. 50:18-22). She also completed a pain diagram with similar markings on the posterior aspect of the left shoulder on November 19, 2020. (Resp. Ex. C, p. 57). Nonetheless, Dr. Erickson testified that he did not believe that Claimant had sustained a left shoulder injury because she was working regular duty and by her admission, her pain was minimal.[5] (Hrg. Tr., p. 53:6-14). Dr. Erickson also testified that while Claimant marked pain over the posterior aspect of the left shoulder on November 19, 2020, her physical examination from this date indicated that there was no pain present. *Id*. Review of the 11/19/2020 report of Dr. Centi indicates simply that there was no pain to palpation of the left upper arm. (Resp. Ex. C, p. 55). The indication "pain to palpation is not present" appears to be a simple carryover from previous documentation. Indeed, both NP Madrid and Dr. Centi noted the same in their 10/1/2020, 10/15/2020, and 11/5/2020 reports. Importantly, Dr. Centi noted the same "pain to palpation is not present" passage in his 10/27/2020 report despite Claimant clearly marking aching pain in the left shoulder. Accordingly, the ALJ questions the reliability of Dr. Centi's remarks concerning the absence of pain as documented in his 11/19/2020 report.

44. Based upon the evidence presented, the ALJ credits Claimant's testimony, including her report to Dr. Brodie, to find that she was probably still having pain in her left arm/shoulder at the time Dr. Centi released her at MMI on November 19, 2020. Indeed, the ALJ is convinced that Claimant was probably reporting pain in her left shoulder verbally during the entire time she was under the care of NP Madrid and Dr. Centi. If, as Dr. Erickson suggests, Claimant was not reporting shoulder pain because the written reports from NP Madrid and Dr. Centi are devoid of such complaints, why did NP Madrid and Dr. Centi direct any attention, as limited as it was, to the left shoulder on 8/12/2020, 8/18/2020 and 9/1/2020? Here, the evidence presented persuades the ALJ that both NP Madrid and Dr. Centi largely ignored Claimant's left shoulder complaints to focus on her "primary" problem, specifically her cervical and lumbar strains which were causing more intense symptoms including substantial stiffness and pain with movement. (Resp. Ex. C, pp. 26, 30, 34, 38, 42, 46, 50, 54). For these reasons, Dr. Erickson's reliance on the CCOM reports and the pain diagrams as proof that Claimant's left shoulder rotator cuff tear is degenerative is unconvincing

45. Based upon the evidence presented, the ALJ finds that Claimant's current

[5] While he explained that Meloxicam, Tizinadine and over-the-counter medications such as Tylenol would not completely mask, i.e. eliminate the pain associated with an acute rotator cuff tear, Dr. Erickson testified that he expected that such medications would help "decrease the pain level." (Hrg. Tr., p. 40:19-23). Consequently, the ALJ is not surprised that Claimant may have reported minimal pain during some of her medical appointments.

pain complaints are likely multifactorial in nature and caused by a combination of an acute injury to the rotator cuff and an aggravation of a pre-existing condition in the cervical spine. Here, the evidence presented supports a finding that Claimant's early treatment focused almost exclusively on her neck, mid and low back rather than her left shoulder despite her August 7, 2020 pain diagram clearly depicting aching pain in the left shoulder. The evidence presented persuades the ALJ that Claimant has proven that there is a causal connection between her August 6, 2020 slip and fall, her rotator cuff tear and her need for surgery. Accordingly, Respondents are liable for such treatment.

CONCLUSIONS OF LAW

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

Generally

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

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

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

Appeals Office, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo.App. 2008). To the extent, expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting all, part or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968); see also, *Dow Chemical Co. v. Industrial Claim Appeals Office*, 843 P.2d 122 (Colo.App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary opinion). When considered in its totality, the ALJ concludes that the evidence in this case supports a reasonable inference/conclusion that Claimant's current pain complaints are likely emanating from both an injury to the rotator cuff and an aggravation of a pre-existing cervical spine condition caused directly by Claimant's fall to a concrete floor on August 6, 2020 after slipping in a puddle of water.

Medical Benefits

D. Claimant bears the burden of establishing entitlement to medical treatment. *See Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997); *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo.App. 1990). Once a claimant has established a compensable work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary medical care to cure and relieve the effects of the work injury. *Section 8-42-101, C.R.S.*; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). However, a claimant is only entitled to such medical benefits if the industrial injury is the proximate cause of his/her need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949); *Standard Metals Corp. v. Ball, 172 Colo. 510, 474 P.2d 622 (1970); § 8-41-301(1)(c), C.R.S.* Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo.App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability was caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those that flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, *supra*.

E. Where the relatedness, reasonableness, or necessity of medical treatment is disputed, the claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003). The question of whether a particular medical treatment is reasonably necessary to cure and relieve a claimant from the effects of the injury is a question of fact. *City & County of Denver v. Industrial Commission*, 682 P.2d 513 (Colo.App. 1984). The question of whether the need for treatment is causally related to an industrial injury is also one of fact. *Walmart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 521 (Colo.App. 1999). In this case, there is no dispute surrounding the question of whether the surgery

recommended by Dr. Fitzpatrick is reasonable and necessary. Rather, the question is whether Claimant's need for such surgery is causally related to her August 6, 2020 slip and fall. As found, the evidence presented persuades the ALJ that based on Claimant's described MOI; she probably suffered an acute tear of the rotator cuff when she fell to the concrete floor on August 6, 2020. The evidence presented persuades the ALJ that this compensable "injury" is the proximate cause of Claimant's need for medical treatment, including Dr. Fitzpatrick's recommended surgery. As found above, the contrary conclusions of Dr. Erickson are unconvincing. Although Claimant's imaging does not contain edema consistent with an acute injury, it is important to note that this imaging was done months after the initial trauma to the shoulder at a point where any edema would likely have resolved. Accordingly, the ALJ concludes that Claimant has established that the surgical procedure recommended by Dr. Fitzpatrick is causally related to her August 6, 2020 work-related slip and fall. Moreover, even if contested on reasonable and necessary grounds, the totality of the evidence presented establishes that the recommended surgery represents the last best resort to cure and relieve Claimant from her ongoing injury related pain and shoulder dysfunction. Consequently, the ALJ concludes the procedure is reasonable and necessary.

ORDER

It is therefore ordered that:

1. Respondents shall authorize and pay for the surgery recommended by Dr. Jennifer Fitzpatrick.

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

DATED: September 2, 2022

/s/ Richard M. Lamphere

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

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

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-039-027-003

ISSUES

The issues set for determination included:

- Is Respondent precluded from litigating the issue of causation concerning Claimant's low back injury based upon the prior Order issued by ALJ Peter Cannici?

- Did Respondent overcome the opinions of the physician who performed the Division of Workers' Compensation Independent Medical Examination ("DIME") [David Yamamoto, M.D.] regarding permanent medical impairment by clear and convincing evidence?

PROCEDURAL STATUS

The undersigned ALJ issued a Summary Order on December 27, 2021, which was mailed on December 27, 2021. Respondent requested a full Order on January 5, 2022. Full Findings of Fact, Conclusions of Law and Order was issued on June 21, 2022 and mailed on June 22, 2022. Respondent filed a Motion for Corrected Order, but the undersigned was not able to issue an Order on the Motion within thirty days as set forth in § 8-43-302(1), C.R.S.

On or about July 6, 2022, Respondent filed a Petition to Review. Respondent filed a Brief in support of the PTR. This Order is issued pursuant to § 8-43-301(5), C.R.S, to address an issue raised in the PTR, namely Claimant's impairment rating and PPD benefits portion of the Order. (See Respondent's Brief in Support of Petition to Review pp. 1-2)

FINDINGS OF FACT

1. There was no evidence in the record that prior to February 2017, Claimant suffered an injury to his lumbar spine or required treatment for that area of the body.

2 On February 2, 2017, Claimant was injured when he slipped and fell on black ice while in the course and scope of his employment. Claimant injured his low back and right hip as a result of the fall. Claimant was transported by ambulance to the Emergency Department of Good Samaritan Hospital.

3. Claimant was hospitalized at Good Samaritan Hospital where x-rays showed he had a comminuted intertrochanteric and subtrochanteric fractures of the right hip with displacement and varus angulation.

4. On February 3, 2017, Claimant underwent surgery for the intertrochanteric and subtrochanteric fractures, which was performed by George Chaus, M.D. The surgery included open reduction internal fixation of the fractures with an intramedullary implant. Dr. Chaus noted the characterized the fracture was "significantly more difficult for fixation and reduction than a standard intertrochanteric or subtrochanteric hip fracture with significant deforming forces requiring an open reduction, cerclage cable wiring and advanced trauma techniques.

5. Claimant was hospitalized at Good Samaritan through February 6, 2017. Claimant was evaluated by ATP Dean Prok, M.D. at SCL Broomfield on March 10, 2017. Claimant, who was using a wheelchair and cane, reported right upper/lateral leg pain. Dr. Prok diagnosed Claimant with right hip pain, right knee pain and acute intractable tension-type headaches.

6. Claimant was at a skilled nursing facility (Advanced Health Care) for approximately one month before he returned home.

7. The medical records admitted at hearing showed Claimant continued to use a wheelchair and a cane. On March 17, 2017, Claimant returned to Dr. Chaus. Claimant described weight bearing status as "toe touch weight bearing". Claimant did not report lumbar pain. Dr. Chaus also evaluated Claimant on April 18, 2017, who noted he was still using a wheelchair. Dr. Chaus said Claimant was to transition to weight bearing.

8. On April 11, 2017, Claimant returned to light duty work with Employer. He had restrictions of no lifting or carrying more than two (2) pounds, and no walking, crawling, kneeling, squatting, climbing, or driving. Claimant was directed to use the wheelchair for movement a maximum of 2-4 minutes per hour. X-rays taken on April 28, 2017 documented the fact that the hip fracture was healing well.

9. On May 19, 2017 Claimant returned to Dr. Prok for an examination. Claimant did not report any lower back pain. He utilized a walker instead of a wheelchair. Claimant advised Dr. Prok that he would be leaving soon for a one month-long vacation in the Philippines. Dr. Prok referred Claimant to Nicholas K. Olsen, D.O. for an examination.

10. On June 29, 2017 Claimant was evaluated by Dr. Olsen. Claimant mentioned the recent trip to the Philippines with his family. While in the water he was able to walk with a normal gait and significantly reduced pain. Claimant noted a marked increase of pain with a single-legged stance on the right lower extremity, difficulty walking upstairs and relief when sitting in a recliner or propping his leg up with pillows in bed. Dr. Olsen noted mild forward flexed posture and moderate range of motion deficits in both flexion and extension. Dr. Olsen prescribed land-based physical therapy and pool therapy because of Claimant's good experience with water walking while in the Philippines.

11. Over the next four months, Claimant received treatment including physical therapy ("PT") and his treatment was overseen by Dr. Prok. Claimant's initial visit at

CACC Physical Therapy was on July 10, 2017. He advised the therapist that his greatest difficulty was with walking; that dressing himself was a challenge, especially putting on his right sock and shoe; that sitting and driving for long periods aggravated his pain; and that he utilized a chair lift at home. The initial PT exam revealed deficits in strength, flexibility, and walking tolerance, which limitations restricted his ability to perform usual work and activities of daily living (ADL-s). Claimant received PT at CACC until August 31, 2017.

12. On August 24, 2017 Claimant visited Dr. Olsen for an examination. Claimant was using a straight cane mostly at work but less at home. He reported anterior right groin pain when weight-bearing as well as pain in his right knee and hip. Claimant did not mention pain in his lumbar spine or SI joint. Dr. Olsen noted "neutral mechanics" in the lumbar spine and full range of motion ("ROM").

13. Dr. Prok saw Claim at regular intervals from September 22, 2017 through March 5, 2018. Claimant reported right knee pain and Dr. Prok included "acute pain of right knee" in his diagnoses. These records reflected Claimant's continued use of a cane.

14. On February 5, 2018 Dr. Olsen added, "acute deep vein thrombosis (DVT) of the distal vein of right lower extremity" to his diagnoses. He noted that Claimant's personal physician was managing the DVT with blood thinners.

15. Dr. Prok concluded Claimant reached MMI on March 5, 2018. At that time, Claimant was reporting right hip, right knee and right thigh pain. Claimant was using a cane to ambulate. Dr. Prok assigned Claimant a 21% lower extremity impairment and 20% for the implant arthroplasty, pursuant to Table 45 of the *AMA Guides*.

16. Respondent filed a Final Admission of Liability ("FAL") on March 22, 2018, admitting to Dr. Prok's impairment rating.

17. On September 7, 2018 Claimant underwent a DIME that was conducted by David Yamamoto, M.D. Claimant reported pain in the right hip, right leg, right knee and low back. Dr. Yamamoto determined that Claimant had not reached MMI. After reviewing Claimant's medical records and conducting a physical examination, Dr. Yamamoto diagnosed Claimant with the following: (1) right hip intertrochanteric fracture/subtrochanteric fracture with extension to the proximal right femur requiring an intramedullary implant; (2) antalgic gait requiring frequent use of a cane; (3) mechanical lower back pain secondary to the antalgic gait; and (4) DVT following the right hip fracture, lengthy immobilization and inactivity post-injury.

18. Dr. Yamamoto stated Claimant's continuing antalgic gait was secondary to his work injury, which resulted in persistent lower back pain and dysfunction that had not been formally treated. This conclusion regarding causation was persuasive to the ALJ. Dr. Yamamoto recommended a trial of physical therapy. However, if Claimant did not respond to treatment, Dr. Yamamoto suggested he be referred to a physiatrist for further evaluation and treatment.

19. After a hearing was conducted on February 7, 2019, ALJ Cannici issued Findings of Fact, Conclusions of Law and Order, dated March 19, 2019, which was mailed March 20, 2019.[1] More particularly, on the causation question, ALJ Cannici found: "[B]ased upon the medical evidence in the record, the ALJ determined Claimant suffered an injury to his lumbar spine as a result of his February 2, 2017 work injury". Judge Cannici found Respondent did not meet its burden of proof to overcome Dr. Yamamoto's opinion on MMI:

> "Respondent has failed to demonstrate that Dr. Yamamoto improperly applied the *AMA Guides* or otherwise erred in concluding that Claimant had not reached MMI. Although Dr. Cebrian disagreed with Dr. Yamamoto's determination that Claimant has not reached MMI, the conclusion was not clearly erroneous. The medical records and credible testimony reflect that Claimant was initially confined to a wheelchair after his industrial injuries, transitioned to a walker and then began using a cane. Claimant explained that he reported lower back pain to Dr. Prok sometime after he started occasionally walking with a cane. He had not suffered any lower back pain while using a wheelchair. Dr. Yamamoto reasoned that Claimant suffered an antalgic gait requiring frequent use of a cane that caused him to develop lower back pain. Dr. Cebrian's disagreement regarding Claimant's development of lower back pain does not undermine Dr. Yamamoto's reasonable reliance on Claimant's clinical history and credible reports".[2]

20. The ALJ determined the issues adjudicated at the February 7, 2019 hearing were different than those at the instant hearing. In particular, the first hearing involved the issue of MMI, while the latter concerned the question of Claimant's permanent medical impairment.

21. Respondent filed a General Admission of Liability ("GAL") on May 3, 2019, referencing Dr. Yamamoto's determination that Claimant was not at MMI, as well as ALJ Cannici's Order.

22. Claimant returned to Dr. Prok on May 24, 2019. It was noted he was working with permanent restrictions and used a cane for support. He reported low back pain above the hip, along with aching/burning in that area, as well as the right hip area. On examination, Dr. Prok noted Claimant reported pain in the hip, lower leg and knee areas diffusely. Pain was also present in the right low back, with tenderness to palpation in the right lumbosacral and thoracic region and SI area. Dr. Prok referred Claimant to Scott Primack, D.O. and for PT.

23. Claimant underwent seven treatment sessions at CACC Physical Therapy beginning on June 21, 2019, with modalities including deep tissue massage and neuromuscular treatments. The massage therapist who assessed Claimant found he had hypertonicity or tension in his quadratus lumborum, glutes, and lumbar paraspinals at

[1] This Order was admitted into evidence as part of Exhibit KK, pp. 350-360.

[2] Exhibit KK, p 356.

each of the seven (7) visits. By the end of therapy on August 16, 2019, Claimant's left and right quadratus lumborum muscles were still hypertonic. The ALJ noted these treatments were in connection with low back pain and the physical therapist's findings of hypertonicity.

24. On July 12, 2019, Claimant was evaluated by Dr. Prok. His pain complaints were similar to the previous evaluation, including right low back, gluteal and hip pain. On examination, Dr. Prok noted mild decreased ROM at the hip, with minimal soreness in the knee and hip area. Right and left low back pain was present on movement at end range. Dr. Prok's assessment was: S/P ORIF fracture; acute pain of right knee; pain and swelling of left lower leg; fall; closed fracture of the right hip with routine healing; chronic right-sided low back pain without sciatica; acute DVT of the distal vein of right lower extremity.

25. On July 19, 2019, Claimant was evaluated by Dr. Primack. He reported a 20% improvement in connection with his lumbar spine, with increased pain with sitting and improvement with walking. Dr. Primack noted on examination that Claimant had a Trendelenburg gait pattern without the cane, which was an issue of hip mechanics as compared to spine mechanics. The Trendelenburg gait pattern was still present with the cane, but less so. Dropping of the right pelvis was present, which was consistent with a gluteus medius level weakness. Lumbar flexion was 40°, extension was 20°, with some discomfort with extension noted. (The ALJ found these measurements showed restrictions in ROM). Right and left lateral side bending or within normal limits.

26. Dr. Primack's diagnoses were: pelvis and hip intertrochanteric and subtrochanteric hip fracture, which resulted in an intra-medullary implant, with a significant breaking the right proximal femur; Claimant had extensive PT and was followed by Dr. Prok, with no report of back pain. Claimant was referred to Dr. Olsen, who managed Claimant's recovery, with neutral mechanics were demonstrated at follow-up appointments; MMI by Dr. Prok on March 5, 2018; DIME on September 7, 2018; subjective symptoms as described. Dr. Primack did not foresee any permanent residual impairment at the level of the lumbar spine, but ordered a lumbar MRI.

27. Claimant underwent a lumbar MRI on July 26, 2019. The films were read by Eduardo Seda, M.D. Dr. Seda's impression was: L1-2 left paracentral extruded free disc fragment, with moderate dural sac narrowing and mild crowding of the cauda equina; degenerative disc joint changes at the other level without dural sac or root sleeve deformity. The ALJ found the MRI provided evidence of objective conditions within Claimant's lumbar spine.

28. Claimant returned to Dr. Primack on August 16, 2019, at which time the MRI was reviewed. On examination, Claimant had 18° of hip extension, 28° abduction, adduction was 20°, internal rotation was 26° and external rotation was 44°. Dr. Primack concluded Claimant was at MMI. He opined there was no specific work-related lumbar spine injury, but lumbar spondylosis was present. Dr. Primack concluded Claimant had a 16% impairment of the lower extremity.

29. On October 4, 2019, Dr. Prok placed Claimant at MMI and noted an impairment rating was previously assigned. Dr. Prok's diagnoses were: closed fracture of right hip with routine healing; chronic right-sided low back pain without sciatica; right hip pain; acute pain of right knee; S/P ORIF fracture; fall subsequent encounter. Dr. Prok stated Claimant had permanent restrictions of no running and use of cane, as needed. The record did not contain ROM testing worksheets for Claimant's hip or lumbar spine performed by Dr. Prok.

30. On November 15, 2019, Claimant returned to Dr. Yamamoto for the follow-up DIME. At that time, Claimant reported right hip, right lower back and right leg pain. Dr. Yamamoto noted decreased ROM in all planes and the left iliac crest was slightly lower than the right. Dr. Yamamoto observed that after the first DIME, the lower back was then marked on all the subsequent pain diagrams and the lower back pain was noted in the physical therapy that was done after the first DIME report.

31. Tenderness was found over the right paraspinal musculature. Decreased ROM of the right hip was found with the following measurements: flexion 90°, extension 20° degrees, abduction 40°, abduction 40°, internal rotation 24°, external rotation 36°. Dr. Yamamoto's diagnoses were: right hip inter-trochanteric fracture, sub trochanteric fracture with extension at right proximal right femur requiring an intramedullary implant; healthy gait requiring frequent use of cane; mechanical low back pain secondary to the antalgic gait; history of DVT following the right hip fracture, causation unclear.

32. Dr. Yamamoto concluded Claimant had a permanent medical impairment for the lumbar spine of 15%, which included 5% from Table 53, IIB of the *AMA Guides*, with 10% assigned for loss of ROM. For the right hip, he was assigned an ROM impairment of 14%, which converted to a 6% whole person impairment. Dr. Yamamoto included worksheets for the impairment rating and reviewed the reports of Dr. Olsen and Dr. Primack. Dr. Yamamoto disagreed that Claimant's low back was not related to the work injury and specifically commented on Dr. Cebrian's conclusions, as follows:

> "He (Dr. Cebrian) opined that through a large portion of the medical care, there was not documentation of any lumbar spine complaints. (*Comment: Mr. [Claimant] states that he did mention the lower back pain on several occasions but it was not documented. The low back pain was not documented at all until after I performed the Division IME and when he returned to treatment the lower back pain was then documented and addressed.)*
>
> "He (Dr. Cebrian) opined on page 22 of his report that the lumbar spine complaints were not causally related to the claim. He noted that I indicated that Mr. [Claimant] used a cane 80% of the time because of his gait abnormality. He stated that the purpose of a cane was to redistribute the weight from the lower leg that is weaker (or) painful and to improve stability by increasing the base of support and by utilizing a cane it takes additional for(ce) (off of) the spine and should lessen any muscular related soreness secondary to a gait abnormality. (*Comment: I certainly am aware of this but Dr. Cebrian also did*

not take into account the fact that the ongoing use (of) the cane clearly showed that his gait was not stable this would strongly indicate that he was having difficulty with pelvic stability which could in my opinion clearly was the cause of ongoing significant mechanical low back pain.)

"He (Dr. Cebrian) also stated that even if Mr. [Claimant] had some lumbar muscular soreness as a result of the gait abnormality, the muscular soreness did not rise to the level of permanent impairment. (*Comment: If this was muscular soreness, I would not expect it to persist for a period of over 2 years.)*[3]

Dr. Yamamoto articulated his rationale for including the lumbar spine as follows:

"With all due respect, I am not in agreement with the findings from Dr. Cebrian. Dr. Cebrian that the hip injury should be a scheduled impairment even though he noted that Mr. [Claimant] required the use of a cane and that a Trendelenburg gait was documented clearly by Dr. Primack. This is clear evidence that the impairment extends above the right hip joint. Dr. Primack also noted back pain even though he did not a pine that this was readable and thought it was more muscular. I would argue that this is more than a muscular problem and rises to the level of a spine impairment. It is clear that the lumbar dysfunction is a chronic condition and is expected to improve. In regard to the DVT, I find it more than a coincidence that this happened on the same side that he had the severe hip fracture. There was a long period of time between the fracture and the DVT and it appeared that this was at least eight months although Mr. [Claimant] reported that it was six months when I first saw him. He does have increased risk because of his age and obesity as Dr. Cebrian pointed out but in my opinion, this is more than coincidence. However, I did not have some of the records from Dr. Olsen, when I did the initial DIME. I will concede that there is not convincing evidence regarding the work relatedness of the DVT although I certainly am of the opinion that the right femur injury played a significant role. I have elected not to rate the DVT. I am strongly of the opinion that the mechanical low back pain is a result of the ongoing altered gait and again have included the lower back as part of the impairment. It is noted that there was a small herniated disc in a one-two which I believe to be an incidental finding".[4]

33. The ALJ credited Dr. Yamamoto's opinion and found it more persuasive than those offered by Dr. Cebrian and Dr. Primack.

[3] Ex. II, pp. 323-325.

[4] Ex. II, pp. 327-328.

34. There was no evidence in the record that Dr. Yamamoto's rating was invalid. The ALJ found that Dr. Yamamoto's conclusion that Claimant had a permanent medical impairment was supported by the medical evidence in the record.

35. On March 20, 2020, Carlos Cebrian, M.D. conducted a follow-up evaluation of Claimant, at the request of Respondent.[5] At that time, Claimant's complaints included: limping while walking; swelling, right leg; pain, right hip; pain, lower back. On examination, Claimant's lumbar spine had no spasms, trigger points or atrophy. Straight leg raise was to 60°, with negative FABER and Patrick signs. ROM with dual inclinometers was: 62° in flexion, 25° in extension, 25° in right lateral flexion and 25° and left lateral flexion. Dr. Cebrian's diagnosis that were claim-related included: right hip fracture, with surgery performed by Dr. Chaus.

36. Dr. Cebrian concluded Claimant's lumbar spine complaints were not causally related to the February 2, 2017 injury, reasoning that there was no documentation of lumbar spine complaints for an extended period of time after the injury. Dr. Cebrian also opined that Claimant's lower extremity DVT was not causally related to the February 2, 2017 injury. He disagreed with Dr. Yamamoto and opined Claimant had a medical impairment rating of his right hip totaling 18% lower extremity impairment, which converted to a 7% whole person impairment.

37. Dr. Cebrian testified at hearing and said his examination of Claimant revealed that when using a cane, Claimant's gait normalized. (The ALJ noted this differed from the opinion offered by Dr. Primack). Without the cane, Claimant had a Trendelenburg gait, which Dr. Cebrian explained occurred due to hip dysfunction, with one hip dropping lower than the other. When using a cane, Claimant's hips stabilized and this was why his impairment was limited to the hip. Dr. Cebrian testified that Claimant did not sustain an injury to the lumbar spine and had no permanent impairment to that area of his body.

38. The ALJ found Respondent failed to overcome the opinions of DIME physician, Dr. Yamamoto. The opinions expressed by Dr. Cebrian differed from Dr. Yamamoto, but did not establish an error. The ALJ concluded Dr. Yamamoto's opinion regarding permanent medical impairment was supported by the medical evidence.

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

CONCLUSIONS OF LAW

General

[5] Dr. Cebrian's prior evaluation was November 29, 2018. In that report, he stated Claimant was at MMI. The ALJ noted Dr. Cebrian's subsequent report reiterated other opinions from the prior report, including his disagreement with Dr. Yamamoto concerning Claimant's date of MMI and whether his low back condition was causally related to the work injury.

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

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). The ALJ must make specific findings only as to the evidence found persuasive and determinative. An ALJ "operates under no obligation to address either every issue raised or evidence which he or she considers to be unpersuasive". *Sanchez v. Indus. Claim Appeals Office of Colo.*, 411 P.3d 245, 259 (Colo. App. 2017), citing *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, *supra*, 5 P.3d at 389.

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

Issue preclusion

Claimant argued that the doctrine of issue preclusion barred Respondent from contesting the issue of causation or relatedness, as this issue was previously litigated. Issue preclusion is an equitable doctrine that bars relitigation of an issue that has been finally decided by a court in a prior action. *Bebo Construction Co. v. Mattox & O'Brien,* 990 P.2d 78, 84-85 (Colo. 1999). The purpose of the doctrine is to relieve parties of the burden of multiple lawsuits, to conserve judicial resources, and to promote reliance upon and confidence in the judicial system by preventing inconsistent decisions. *Id*. Issue preclusion operates to bar the relitigation of matters that have already been decided as well as matters that could have been raised in prior proceedings. *Argus Real Estate, Inc. v. E-470 Pub. Highway Auth.*, 109 P.3d 604, 608 (Colo. 2005).

The doctrine of issue preclusion prevents relitigation of an issue when the following apply: (1) the issue sought to be precluded is identical to an issue actually determined in the prior proceedings; (2) the party against whom estoppel is asserted has been a party to or is in privity with a party to the prior proceeding; (3) there is a final judgment on the merits in the prior proceeding; and (4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding. *Sunny Acres Villa, Inc. v. Cooper,* 25 P.3d 44 (Colo. 2001). All elements of issue preclusion were not met in the case at bench.

As found, there were not identical issues litigated at the February 7, 2019 and August 20, 2020 hearings, as the former hearing involved the question of MMI and the latter, medical impairment. (Finding of Fact 20). Even though the issue of causation was an intrinsic part of both hearings, the ultimate issues were different. Therefore, the doctrine of issue preclusion does not apply in the case at bar.

Overcoming the DIME

In resolving this issue concerning Claimant's impairment, the ALJ noted the question of whether Respondent overcame Dr. Yamamoto's opinion is governed by §§ 8-42-107(8)(b)(III) and (c), C.R.S. *Peregoy v. Indus. Claim Apps. Office*, 87 P.3d 261, 263 (Colo. App. 2004). These sections provide that the findings of a DIME physician selected through the Division of Workers' Compensation shall only be overcome by clear and convincing evidence. § 8-42-107(8)(b)(III), C.R.S.; *Leprino Foods Co. v. Indus. Claim Appeals Office*, 134 16 P.3d 475, 482-83 (Colo. App. 2005); *accord Martinez v. Indus. Claim Appeals Office*, 176 P.3d 826, 827 (Colo. App. 2007). Clear and convincing evidence is highly probable and free from serious or substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995). The mere difference of medical opinions does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAO July 19, 2004).

In this case, Respondent disputed whether Claimant was entitled to a permanent medical impairment for his lumbar spine and contended the scheduled hip rating (14%) should be converted to the whole person impairment (6%) as an impairment not on the schedule. Respondents cited the opinions of Dr. Cebrian and Dr. Primack to support their argument. Claimant argued that insufficient evidence was introduced to overcome Dr. Yamamoto's opinions and that the clear and convincing evidentiary standard was not met.

There was no dispute about the underlying facts in the case. As determined in Findings of Fact 2-9, Claimant was injured at work on February 2, 2017 when he slipped and fell on icy concrete surface while checking fire extinguishers. He sustained comminuted intertrochanteric and subtrochanteric fractures of the right hip, with displacement and varus angulation. Claimant underwent surgery on February 3, 2017 and underwent an open reduction internal fixation procedure, with an intra-medullary implant performed by Dr. Chaus. Dr. Chaus noted Claimant had a significant break in the right proximal femur. *Id.*

Claimant was released from Good Samaritan Hospital and spent approximately one month in a skilled nursing facility. (Findings of Fact 5-6). Claimant was using a wheelchair and cane, as reflected in the medical records admitted at hearing. *Id.* When Claimant returned to light duty on April 11, 2017, he was using a wheelchair and then also using a walker. The evidence in the record reflected that Claimant continued to use the cane throughout this period of time. (Findings of Fact 9-13). As found, the medical

records reflected Claimant did not report low back pain in the period of time after his surgery, but reported hip and groin pain. *Id.* Claimant's ATP Dr. Prok determined Claimant reached MMI on March 5, 2018. (Finding of Fact 15).

In the first DOWC-sponsored IME, Dr. Yamamoto concluded Claimant was not an MMI. (Finding of Fact 17). Claimant reported low back pain and Dr. Yamamoto opined that as a result of the work injury and resulting altered gait, Claimant had low back symptoms. (Finding of Fact 18). The ALJ credited this opinion. A hearing was held on the question of whether Claimant was at MMI and ALJ Cannici concluded Respondent had not overcome Dr. Yamamoto's conclusions by clear and convincing evidence. (Finding of Fact 19).

As determined in Findings of Fact 22-23, Claimant was evaluated by Dr. Prok and received additional treatment, including PT to address low back complaints. As found, in the subsequent evaluations by Dr. Prok and Dr. Primack, Claimant reported low back pain in pain diagrams following the first DIME and low back pain was included in the assessment by those physicians. *Id.* Dr. Prok then placed him at MMI on October 4, 2019. (Finding of Fact 29).

In the case at bar, the ALJ determined Respondent did not meet its burden of proof. The ALJ's rationale was twofold; first, there was no evidence that Dr. Yamamoto's conclusions were more probably erroneous or that his findings at the time of the DIME were in error. The ALJ found that Dr. Yamamoto's ROM measurements were valid at the time he performed the evaluation and the evidence submitted Respondent did not refute this fact. (Finding of Fact 34). In this regard, Dr. Yamamoto's conclusion that Claimant had a permanent medical impairment in his lumbar spine was supported by the fact that the records showed he had pain and qualified for such an impairment under the *AMA Guides*. (Findings of Fact 33-34).

In addition, Dr. Yamamoto concluded Claimant's mechanical back pain was related to his altered gait. (Findings of Fact 18, 32). As part of his reports for both evaluations, Dr. Yamamoto provided a detailed explanation as to the basis of this opinion. *Id.* In the second DIME report, Dr. Yamamoto specifically addressed the conclusions of Dr. Cebrian and expressed his disagreement. (Finding of Fact 32). Dr. Yamamoto explained his reasoning with regard to the etiology of Claimant's low back pain. *Id.* The ALJ found Dr. Yamamoto's opinion to be persuasive. (Finding of Fact 33).

Second, the evidence adduced by Respondents to contravene Dr. Yamamoto's opinion simply constituted a difference of opinion. Dr. Cebrian disagreed that Claimant had a medical impairment to his lumbar spine, however, the ALJ found Dr. Cebrian did not refute that Claimant's low back condition was causally related to the work injury or that Dr. Yamamoto's rating was valid. (Findings of Fact 36-38). Dr. Cebrian also disagreed that Claimant had a permanent medical impairment related to the industrial injury. Dr. PrimcakThe ALJ determined this did not constitute sufficient evidence to meet the clear and convincing evidentiary standard and Respondent is required to pay PPD benefits based upon Dr. Yamamoto's rating.

ORDER

It is therefore ordered:

1. Respondent did not meet its burden to overcome the DIME physician's findings with regard to Claimant's medical impairment rating by clear and convincing evidence.

2. Claimant sustained a 15% whole person impairment of his lumbar spine and a 14% scheduled impairment of his right hip as a result of his industrial injury.

3. Respondent shall pay PPD benefits based upon Dr. Yamamoto's medical impairment rating. Respondent is entitled to a credit for PPD benefits previously paid.

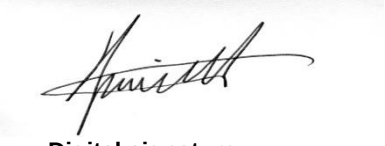
4. Respondent shall pay 8% statutory interest on all benefits not paid when due.

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

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

DATED: September 2, 2022

STATE OF COLORADO



Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts

ISSUES

- Whether Claimant proved Respondents failed to pay Claimant permanent partial disability (PPD) benefits pursuant to a settlement agreement.

FINDINGS OF FACT

1. Claimant is a 76-year-old accounting clerk who was employed with Employer beginning in October 2018.

2. Claimant sustained a work injury to her right arm while working for Employer on June 17, 2019.

3. Respondents admitted liability for the work-injury and provided worker's compensation benefits to Claimant, which included temporary total (TTD) and temporary partial disability benefits (TPD).

4. Claimant's authorized treating physician (ATP) Lynne Fernandez, M.D. placed Claimant at maximum medical improvement (MMI) on November 2, 2021 with an 8% permanent impairment rating for the right upper extremity.

5. Respondents filed a Final Admission of Liability (FAL) on November 24, 2021 admitting for the 8% scheduled impairment rating provided by Dr. Fernandez. The Benefit Summary specified the following amounts, in relevant part:

- Medical to Date (total) $31,755.66
- Disfigurement (total) $2,000.00
- Temporary Total Disability (total) $7,236.59
- Temporary Partial Disability (total) $1,784.44

Insurer noted an "Amount Overpaid" of $518.48. Respondents admitted for $5,158.40 for the 8% upper extremity impairment and $2,000 for disfigurement. In the remarks sections of the FAL, Insurer wrote, in relevant part: "[Insurer] reserves the right to credit the $518.48 overpayment against future benefits. Insurer reserves the right to claim any and all offsets, recover any and all overpayments, and recover all advances made on account of the claimants indigency, whether specifically referenced in this admission or not." (R. Ex. C, p. 8).

6. On December 7, 2021, Respondents and Claimant entered into a settlement agreement, approved by the DOWC on the same date. Paragraph 2 of the settlement agreement provides, in relevant part,

> In full and final settlement of all benefits, compensation, penalties and interest to which Claimant is or might be entitled as a result of these alleged injuries or occupational diseases, Respondents agree to pay and Claimant agrees to accept the following Five Thousand Two Hundred Fifty Dollars and No Cents ($5,250.00), and payment of any remained unpaid permanent partial disability benefits in one lump sum without discount, in addition to all benefits that have been previously paid to or on behalf of the Claimant.

(Cl. Ex. 2, p. 3).

7. The parties stipulated and agreed that Claimant's claim would never be reopened except on the grounds of fraud or mutual mistake of material fact.

8. AS[Redacted], claims representative for Insurer, credibly testified at hearing on behalf of Respondents. Mr. AS[Redacted] became the claims representative for Claimant's claim in August 2021. Mr. AS[Redacted] testified that, in September 2021, he became aware that Claimant had returned to modified duty sometime in August 2021; however, TTD continued to be paid. Mr. AS[Redacted] used paystubs of Claimant received from Employer to determine that Claimant returned to modified duty on August 25, 2021 and determined how much to pay Claimant in TPD benefits moving forward.

9. Insurer's total claim payout log indicates Claimant was paid TTD benefits through September 21, 2021; however, Claimant returned to work on August 25, 2021 according to wage records and discussions with Employer. While reviewing the total claim payout log, Mr. AS[Redacted] was able to calculate and confirm that Claimant had actually received a total of $10,215.31 in lost wage benefits through direct deposit., when she was only entitled to a total of $9,021.03 in lost wages. Accordingly, Claimant's actual overpayment of lost wage benefits in the amount of $1,194.28, not $518.48.

10. Mr. AS[Redacted] testified that he, via automated workers' compensation programing software, then credited the overpayment of $1,194.28 against Claimant's award of $5,158.40 for her permanent disability. This resulted in a remaining PPD balance of $3,964.12.

11. One payment for PPD was sent in the amount of $620.00, leaving a remaining balance of $3,344.12 in PPD. The remaining PPD was then paid out in a single check for $5,344.12 (which also included $2,000 in disfigurement). A separate check for full and final settlement in the amount of $5,250 was also sent to Claimant. Claimant received all of the aforementioned payments. Insurer paid Claimant the amounts to which she was owed pursuant to the FAL and settlement agreement.

12. Claimant credibly testified at hearing that, after reaching a settlement with Respondents, she expected to receive the admitted PPD without discount for her admitted scheduled arm injury in the amount of $5,158.40, the admitted disfigurement award of $2,000, and the settlement agreement amount of $5,250 for a total of $12,408.40.

13. Claimant contends that, pursuant to the FAL and settlement agreement, she is entitled to $11,889.92 (the admitted PPD of $5,158.40 less the $518.48 claimed overpayment, plus the disfigurement award of $2,000.00 and the settlement agreement amount of $5,250.00). Thus, Claimant argues that she has not been paid $675.80 in PPD benefits to which she is entitled pursuant to the FAL and settlement agreement.

14. Claimant filed an Application for Hearing on January 13, 2022 endorsing the issue of "Failure to pay admitted PPD." (R. Ex. A, p.1).

15. At hearing, Claimant's identified the issue of Insurer's alleged failure to pay admitted PPD pursuant to the settlement agreement, and requested that the ALJ issue an order directing Insurer to pay the full amount. Claimant's position statement again requests that Insurer be ordered to pay the full amount of PPD pursuant to the FAL and settlement agreement. At no time did Claimant endorse or request reopening of the settlement agreement for fraud or mutual mistake of material fact.

CONCLUSIONS OF LAW

Generally

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

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

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

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

Failure to Pay PPD Pursuant to Settlement Agreement

A settlement agreement may only be reopened upon a showing of fraud or mutual mistake of material fact. § 8-43-204(1) and § 8-43-303(2)(a) & (b) C.R.S. As found, Claimant did not request to reopen the settlement agreement, failing to allege fraud or mutual mistake of material fact. Instead, in Claimant's Application for Hearing, at hearing, and in her position statement, Claimant argues the issue of failure to pay admitted PPD. Claimant failed to prove Respondents have not paid PPD benefits pursuant to the FAL and settlement agreement.

It is undisputed that Claimant received payment of $5,250.00 and $2,000.00 for disfigurement pursuant to the settlement agreement. Thus, the specific issue is whether Respondents failed to pay Claimant "any remained unpaid permanent partial disability benefits" as stated in the settlement agreement. In its November 24, 2021 FAL, Insurer noted an overpayment of temporary indemnity benefits in the amount of $518.48 and reserved the right to credit such amount against future benefits. Respondents also specifically stated in the FAL that Insurer reserved the right to "claim any and all offsets, recover any and all overpayments, and recover all advances made on account of the claimants indigency, whether specifically referenced in this admission or not." Respondents thus reserved the right to recover additional overpayments.

Section 8-42-105(3), C.R.S. provides that [t]emporary total disability benefits shall continue until the first occurrence of any one of the following: (a) The employee reaches maximum medical improvement; (b) The employee returns to regular or modified employment; (c) The attending physician gives the employee a written release to return to regular employment; or (d) The attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment. Claimant was paid TTD benefits to which she was not entitled to after returning to modified duty. Claimant does not dispute the amount overpaid benefits. The preponderant evidence establishes that Claimant received an overpayment of TTD benefits, which Respondents were entitled to against future benefits. Here, Respondents recovered the amount Claimant was overpaid in TTD from the permanent disability award within the statutory time allotted and paid Claimant $5,250.00 in settlement, the $2,000.00 disfigurement award, plus the remaining PPD balance. As such, Respondents paid Claimant in accordance with the terms of the FAL and settlement agreement and Claimant has received all monies which she was entitled to under the settlement agreement.

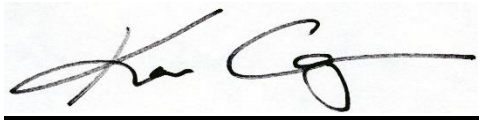
ORDER

1. Claimant’s claim for unpaid PPD benefits is denied and dismissed.

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

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

DATED: September 6, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-183-689-001

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that cervical fusion surgery recommended by Robert Benz, M.D., is reasonable and necessary to cure or relieve the effects of Claimant's industrial injury.

FINDINGS OF FACT

1. Claimant has worked as a school resource officer for Employer since August 2019. On April 26, 2021, Claimant sustained an admitted injury arising out of the course of her employment with Employer when she was struck in the head by a basketball that had been kicked by a student from a short distance away.

2. Claimant initially saw providers at Workwell for her work-related injuries. In the first six weeks following the injury, Claimant attended four visits at Workwell, and reported symptoms including headaches, face pain, neck pain, ringing in her ear. (Ex. 4 & H). At her fifth visit, on June 11, 2021, Claimant reported to Amber Payne, PA-C, that she was experiencing occasional tingling in her left upper extremity. Ms. Payne then referred Claimant for a cervical MRI. (Ex. H). Records prior to June 11, 2021 do not document reports of upper extremity symptoms.

3. Beginning May 5, 2021, Claimant received massage and physical therapy through Workwell. Claimant's first course of therapy ran from May 5, 2021 until September 2021. Claimant later had a second round of physical therapy from February 28, 2022 through April 6, 2022. (Ex. 5 & I). Claimant's cervical range of motion and symptoms did not improve through either course of physical therapy.

4. The cervical MRI, performed on June 26, 2021, showed a mild disc bulge at the C4-5 level, and irregular disc bulges at the C5-6 and C6-7 level. The MRI also demonstrated multilevel degenerative changes with associated canal and foraminal narrowing at each level, most significant at the C6-7 level where a left paracentral disc protrusion resulted in mild flattening of the left lateral spinal cord. (Ex. 3).

5. On July 6, 2021, Claimant returned to Workwell and reported to her then-authorized treating physician (ATP) Robert Dupper, M.D., pain in the left upper extremity with a Spurling's test. Dr. Dupper referred Claimant to Robert Benz, M.D., an orthopedic surgeon for further evaluation. (Ex. H).

6. On August 9, 2021, Claimant saw Dr. Benz, who diagnosed Claimant with cervical facet arthritis, degenerative disc disease, and left-sided foraminal stenosis. Dr. Benz recommended Claimant be evaluated for facet or steroid injections to assess and treat her headaches, neck pain and upper extremity symptoms. He was also recommended a

potential trial of a left-sided medial branch block and radiofrequency ablation. He characterized surgery at that point as a "last resort." (Ex. 7).

7. Claimant returned to Dr. Dupper with continued complaints of headaches, neck pain, and left arm pain. On September 2, 2021, Dr. Dupper referred Claimant to physical medicine and rehabilitation physician Eric Shoemaker, D.O., for evaluation of her cervical pain. (Ex. H).

8. Claimant Dr. Shoemaker on September 16, 2021. In his history, Dr. Shoemaker noted that Claimant had immediate neck pain and that she developed pain radiating down the arm with tingling into the 1st -3rd fingers after a couple of weeks. He reviewed Claimant's June 25, 2021 MRI films, and noted that osteophytic stenosis at the C6-7 level with a soft tissue component. He diagnosed Claimant with left C7 and/or C6 radiculitis secondary to prominent disc osteophyte complex causing severe left foraminal stenosis with impingement on the left hemicord. Claimant also had severe left foraminal stenosis at C5-6. He indicated that based on the mechanism of injury and Claimant's underlying arthropathy, he suspected a component of facet pain as well. Dr. Shoemaker opined that it was probable that Claimant's symptoms were the result of her April 26, 2021 work injury. (Ex. 8). Dr. Shoemaker recommended a left C7-T1 epidural steroid injection.

9. On September 17, 2021, Kenneth Morris evaluated Claimant at the UC Health Neurology Clinic. Dr. Morris reviewed Claimant's MRI and indicated that Claimant's left foraminal C6-7 narrowing was consistent with her symptoms of cervicalgia and left-sided cervical radiculopathy. (Ex. 11).

10. On October 5, 2021, Claimant underwent a psychological evaluation with Melanie Heto, Psy.D. Dr. Heto diagnosed Claimant with adjustment disorder with mixed anxiety and depressed mood. Dr. Heto noted Claimant had moderate symptoms of depression and mild anxiety. She recommended Claimant undergo counseling with Workwell's in-house counselor, Maurene Flory, PhD., LPC. (Ex. 9). Claimant had already begun therapy with Ms. Flory, and attended fourteen sessions between September 10, 2021 and March 3, 2022. (Ex. H)

11. On October 11, 2021, Dr. Shoemaker performed a left C7-T1 interlaminar epidural steroid injection. (Ex. K). On October 27, 2021, Claimant followed up with Dr. Shoemaker and reported the injection did not improve her symptoms, and she noted an increase in left hand paresthesia following the injection. (Ex. 8).

12. Claimant returned to Dr. Benz on December 13, 2021. Dr. Benz noted that the injection Dr. Shoemaker performed did not provide significant or lasting relief. Dr. Benz reviewed x-rays of Claimant's cervical spine and noted a "severe disc space collapse at C6-7, [and] moderately severe narrowing at C5-6. Based on the persistence of Claimant's neck and arm symptoms, Dr. Benz recommended an anterior cervical discectomy and fusion (ACDF) surgery at C5-6 and C6-7. He indicated that there was no guarantee that the ACDF would alleviate all of her pain, he believed the procedure was the best option "especially in regard to her ongoing arm symptoms." (Ex. L).

13. **CLAIMANT'S PRIOR INJURY**: Claimant had a prior cervical injury requiring surgery at the C5-6 level in 2004. Claimant had treatment for her cervical spine following surgery, including evaluations in 2008. An August 9, 2008 MRI showed broad-based disc protrusions at C5-6 and C6-7, with mild left sided neural foraminal narrowing at the C6-7 level, without significant stenosis. (Ex. J). No credible evidence was admitted indicating Claimant had any treatment related to her cervical spine between 2008 and her work injury in April 2021.

14. **BRIAN MATHWICH, M.D. (IME)**: In response to Dr. Benz' surgical recommendation, Respondents obtained an independent medical examination (IME) with Brian Mathwich, M.D., on December 30, 2021. Based on his review of medical records and examination of Claimant, Dr. Mathwich opined that Claimant's cervical impingement and radiculopathy was not causally related to Claimant's work injury, nor was Claimant's pre-existing cervical spine pathology exacerbated by the injury. In reaching this opinion, Dr. Mathwich indicated Claimant did not report any radicular symptoms (*i.e*., left arm pain or and numbness) immediately or within a few weeks of the injury "as one would expect if [Claimant's] pre-existing cervical spine pathology were exacerbated by the injury." Dr. Mathwich stated, incorrectly, that Claimant did not report any radicular symptoms until August 25, 2021[1] "over three months after the injury." (Ex. E). Claimant's medical records (including those Dr. Mathwich reviewed) demonstrate that Claimant reported tingling in the left arm on June 11, 2021; radiating symptoms into her left arm on June 28, 2021, July 6, 2021, and August 5, 2021; and an MRI was performed on June 26, 2021, at least in part, to evaluate the cause of these symptoms. (See Ex. H). Dr. Mathwich opined that Claimant's radicular symptoms were "an expected progression of her underlying cervical pathology which would progress whether she was injured or not." (Ex. F).

15. Dr. Mathwich testified at hearing and was admitted as an expert in family and occupational medicine. At hearing, Dr. Mathwich acknowledged that Claimant's left arm symptoms of "tingling" were first reported on June 11, 2021. He opined that "tingling" was not a radicular finding, and that the delay in symptoms indicates the symptoms were not the result of an injury to the C6 nerve. He opined that he would expect to see radicular symptoms much sooner. Dr. Mathwich testified that if Claimant's symptoms were truly radicular, they would have manifested immediately.

16. **SANDER ORENT, M.D. (IME)**: On February 10, 2022, Sander Orent, M.D., issued an IME report at Claimant's request. Dr. Orent reviewed Claimant's medical records and opined that Claimant's had "significant residuals" from her work injury, including a cervical disc herniation. Dr. Orent also opined that Claimant should undergo the surgery proposed by Dr. Benz. Dr. Orent offered no cogent medical rationale for his opinion that Claimant sustained a cervical disc herniation as the result of her work injury. Dr. Orent further opined that Claimant had not had an EMG study performed, which may "help convince someone of the need for immediate surgery." (Ex. 2).

[1] Although Dr. Mathwich indicates Claimant first reported symptoms on August 25, 2021, no medical record from August 25, 2021 was admitted into evidence. The ALJ infers Dr. Mathwich's statement is a typographical error, and his reference is to the August 5, 2021 record from Dr. Dupper.

17. **BRIAN REISS, M.D. (IME)**: On May 10, 2022, Claimant underwent a second IME at Respondents' request with orthopedic surgeon Brian Reiss, M.D. Dr. Reiss opined that Claimant's neck pain and headaches would be unlikely to respond to the ACDF recommended by Dr. Benz. He testified that the proposed ACDF would also not likely improve Claimant's upper extremity symptoms because she did not respond favorably to Dr. Shoemaker's injections. He also indicated that Claimant's left arm "sensory abnormality may represent C6 and C7 cervical irritation secondary to her pre-existing degenerative condition but temporally does not appear to be work incident related." Dr. Reiss also opined that Claimant's symptoms are likely myofascial in origin, and not related to the cervical spine pathology identified on her MRIs. (Ex. F).

18. Dr. Reiss testified in a post-hearing deposition, and was admitted as an expert in orthopedic surgery. Dr. Reiss testified that he believes Claimant's neck pain is myogenic in origin, and it is not clear that her arm pain is radicular. He testified that the surgery proposed by Dr. Benz is not likely to relieve Claimant's neck pain and "it may or may not improve any of her arm pain because it's not clear if it is radicular." He also testified that Claimant's arm issues could reflect issues at C6-7, but "that it could also be due to longstanding sensory changes because of the longstanding changes on her MRI." The record does not reflect that Claimant has "longstanding sensory changes" as suggested by Dr. Reiss. Primarily, Dr. Reiss raised questions about the cause of Claimant's radicular symptoms, but did not offer any cogent, persuasive hypothesis as to why the pain developed six weeks after surgery.

19. Claimant testified at hearing that at the time of her injury, she was working full duty without restrictions. She testified that she had no symptoms or functional limitations since approximately 2008. Claimant testified that she returned to work the day following her injury at full duty. She was experiencing headaches and neck pain. She testified she was experiencing pain in her left arm that she attributed to the 30 pounds of gear she is required to wear as a school resource officer. Claimant testified she did not initially report arm pain because she thought it would go away, and that she ultimately reported it when it did not go away. Claimant's testimony on the timing and progression of her left arm symptoms was somewhat confusing, in that Claimant inferred that Dr. Dupper did not record her arm symptoms, when she did not see Dr. Dupper in person until June 28, 2021, approximately two weeks after first reporting arm symptoms. The ALJ finds credible Claimant's testimony that she had no treatment or symptoms at the time of her injury.

CONCLUSIONS OF LAW

Generally

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

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

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

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

SPECIFIC MEDICAL BENEFITS AT ISSUE

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

The evidence demonstrates that Claimant has had cervical pathology including disc bulges at the C5-6, and C6-7 level since at least 2008. Comparison of the MRI reports from 2008 and 2021, shows Claimant's developed cervical spine degenerative pathology over this time period. The MRIs and testimony are insufficient to determine whether the progression of Claimant's disc protrusions was acute or degenerative in nature. The evidence, however, does establish Claimant was under no treatment for her cervical spine condition and had no documented complaints of pain or symptoms for more than twelve years before April 2021. Claimant was also able to work full duty while wearing heavy work gear, without restrictions, prior to April 26, 2021.

Claimant did not report symptoms into her left arm until approximately six weeks following her injury. Claimant's testimony that she discussed left arm symptoms with her physicians prior to June 2021 is not credible, given that Claimant's pre-June 11, 2021 records document a denial of numbness and tingling in the hands and fingers. Nonetheless, Claimant did report radicular symptoms in her left arm approximately six weeks after her injury. Multiple treating providers indicated the symptoms were consistent with her cervical pathology, and none of Claimant's treating providers documented concerns about the timing of the reports.

Dr. Mathwich's opinion that Claimant's symptoms are unrelated to her work injury, and are the result of an expected progression of her long-standing cervical pathology is not persuasive. The ALJ finds Dr. Reiss's opinions that Claimant's symptoms are myofascial in nature also unpersuasive. Dr. Reiss acknowledged that Claimant's left arm symptoms may be the result of C6-7 nerve root irritation, but did not believe the timing to represent a work-related issue. The ALJ finds no credible evidence to suggest Claimant spontaneously developed symptoms independent of her work injury, that began six weeks after her work injury purely by happenstance. Given that Claimant has no documented reports of left arm symptoms for more than twelve years before her admitted injury, and no other medically reasonable explanation for the emergence of such symptoms, the ALJ finds it more likely than not that Claimant's work injury combined with her pre-existing pathology to cause her left arm symptoms.

With respect to the request for ACDF surgery, the Colorado Medical Treatment Guidelines, Rule 17, Exhibit 8, Section 8.b.iii. Spinal Fusion sets out certain "Core Requirements" for performance of cervical fusion surgery. These include a psychological evaluation, and other criteria. Recommendation 145 provides "Spinal Fusion is reserved for patients" who meet the following criteria:

1) Cervical radiculopathy resulting in incapacitating pain;
2) Imaging studies (e.g., MRI) consistent with clinical findings, demonstrating nerve root or spinal cord compromise; AND
3) One of the following:
    a. Progressive functional neurological deficit; or
    b. Persistent motor deficit; or
    c. Persistent or recurrent arm pain with functional limitations, unresponsive to conservative treatment after 6 weeks; or

d. Static neurological deficit associated with significant radicular pain.

While the Guidelines are regarded as accepted professional standards for care under the Workers' Compensation Act, it is well settled that they are not definitive. *See Hall v. Indus. Claim Appeals Office*, 74 P.3d 459 (Colo. App. 2003); *Jones v. T.T.C. Illinois, Inc.*, W.C. No. 4-503-150 (ICAO May 5, 2006). An ALJ's consideration of the Guidelines may include deviations from them where there is evidence justifying the deviations. *See Logiudice v. Siemans Westinghouse*, W.C. No. 4-665-873 (ICAO Jan. 25, 2011).

Section 8-43-201(3), C.R.S. provides that when deciding whether certain medical treatment is reasonable, necessary, and related "[t]he director or administrative law judge is not required to utilize the medical treatment guidelines as the sole basis for such determinations." Instead, whether a particular treatment is reasonable and necessary to treat a workplace injury is a question of fact for the ALJ to decide. *See Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002).

Here, Claimant underwent a psychological evaluation and multiple therapy sessions. While the psychological evaluation was not specifically directed at Claimant's surgery, Claimant was diagnosed with moderate depression symptoms and minimal anxiety. No credible evidence was admitted that Claimant's psychological condition would constitute a counterindication for surgery. Similarly, none of Claimant's treating health care providers have expressed that Claimant's psychological diagnosis disqualifies her from surgery.

Claimant has undergone imaging studies demonstrating cord compression, and Claimant has continued to experience left arm symptoms for more than six months, that have been unresponsive to conservative care. Dr. Reiss's testimony that the surgery could relieve Claimant's arm symptoms, but is unlikely to relieve her neck pain is consistent with Dr. Benz's statement in his surgical recommendation. Accordingly, the ALJ finds Claimant has met her burden to establish that it is more likely than not that the ACDF surgery recommended by Dr. Benz is reasonable and necessary to cure or relieve the effects of Claimant's industrial injury.

ORDER

It is therefore ordered that:

1. Claimant request for authorization of the ACDF surgery recommended by Dr. Benz is granted.

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

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

DATED: September 6, 2022

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

ISSUES

I. Whether Claimant is subject to penalties and sanctions for violations of PALJ Eley's September 28, 2021 discovery order.[1]

FINDINGS OF FACT

1. Claimant is the sole proprietor of Respondent-Employer. Claimant's first language is Spanish. Claimant speaks limited English.

2. Claimant sustained an industrial injury on October 16, 2020. Respondent-Insurer filed admissions of liability in this matter and paid Claimant temporary indemnity benefits.

3. On July 27, 2021 Respondent-Insurer filed an Application for Hearing endorsing multiple issues including, *inter alia*, retroactive withdrawal of admissions regarding temporary total disability (TTD) benefits as void *ab initio*, fraud, and overpayment of benefits.

4. To avoid any potential conflicts of interest, Respondent-Insurer referred the matter out to Douglas Stratton, Esq. to represent Respondent-Employer for the purpose of handling the pending litigation.

5. At the time Respondent-Insurer filed the July 27, 2021 Application for Hearing, Claimant was represented by Stephanie Tucker, Esq. Respondent-Insurer sent interrogatories for Claimant to Ms. Tucker on July 27, 2021.

6. Ms. Tucker subsequently withdrew as counsel for Claimant. OAC records reflect that ALJ Susan A. Phillips issued an order on August 9, 2021 granting Ms. Tucker's Motion to Withdraw as Counsel for Claimant. Claimant was aware Ms. Tucker withdrew as his counsel.[2]

7. On September 28, 2021 a prehearing conference was held before Prehearing Administrative Law Judge (PALJ) Craig C. Eley. Claimant appeared *pro se*. Doug Stratton, Esq. appeared on behalf of Respondent-Employer. Respondent-Insurer appeared through counsel, Tom Stern, Esq. An interpreter was present for Claimant. PALJ Eley addressed Respondent-Insurer's Motion to Compel Interrogatory Responses from Claimant and Respondent-Employer. It was undisputed that interrogatory responses

[1] At the start of the hearing, Respondent-Insurer identified penalties and sanctions as the primary issue and requested sanctions in the form of a default judgment with respect to the other issues endorsed on the Application for Hearing. The parties reserved the other issues endorsed in the Application for Hearing.

[2] At hearing the ALJ took administrative notice of the OAC records, to which neither party objected.

were overdue. Neither Claimant nor Respondent-Employer objected to Respondent-Insurer's motion. Respondent-Employer requested an additional 14 days to submit responses, to which Respondent-Insurer had no objection. PALJ Eley issued a Prehearing Order (PHO) dated September 28, 2021 granting Respondent-Insurer's motion and ordering Claimant and Respondent-Employer to deliver responses to interrogatories no later than October 12, 2021.

8. The parties attended a second prehearing conference before PALJ Eley on December 28, 2021. Mr. S[Redacted] appeared on behalf of Respondent-Insurer and Mr. T[Redacted] appeared on behalf of Respondent-Employer. Claimant did not appear at the prehearing conference. The prehearing conference took place on Respondent-Insurer's Motion to Withdraw the Application for Hearing and Motion to Add Penalties and Sanctions as Issues for Hearing. Respondent-Insurer represented that the responses to interrogatories addressed in PALJ Eley's September 28, 2021 had yet to be received, hindering Respondent-Insurer's ability to prepare for the hearing set for January 6, 2022. Respondent-Employer had no objection to allowing Respondent-Insurer to withdraw the Application for Hearing and vacate the hearing. Respondent-Insurer further argued that Claimant was in violation of PALJ Eley's September 28, 2021 order and requested that penalties and sanctions be added as issues for hearing. Respondent-Employer took no position on Respondent-Insurer's motion to add those issues. PALJ Eley issued a PHO on December 28, 2021 granting both motions. PALJ Eley specifically ordered that, despite the withdrawal of the Application for Hearing, the duty of the parties to respond to discovery and interrogatories and to supplement responses remained intact.

9. On November 4, 2021, counsel for Respondent-Insurer mailed Claimant a letter stating that Respondent-Insurer had yet to receive Claimant's responses to interrogatories. Respondent-Insurer notified Claimant that he was in violation of PALJ Eley's September 28, 2021 order and could be subject to sanctions/penalties. Respondent-Insurer requested that Claimant provide answers to interrogatories and within the next two weeks.

10. Respondent-Insurer filed a new Application for Hearing on December 9, 2021, endorsing the same issues from July 27, 2021 Application for Hearing and adding the issues of penalties and sanctions for Claimant's continuous violation of discovery orders.

11. OAC records reflect that on February 3, 2022, Mr. T[Redacted] filed a Motion to Withdraw as Attorney of Record for Respondent-Employer and Notice to Respondent-Employer. On March 2, 2022, ALJ Elsa Martinez Tenreiro issued an order granting Mr. T[Redacted]'s Motion to Withdraw as Attorney of Record for Respondent-Employer.

12. Counsel for Respondent-Insurer mailed Claimant another letter on March 11, 2022, noting Respondent-Insurer still had not received responses to interrogatories from Claimant and detailing the relevant procedural history. The letter notes that Respondent-Insurer filed a new Application for Hearing and that a hearing was set for April 26, 2022. Respondent-Insurer again stated that Claimant was in continuous violation of Judge Eley's September 28, 2021 PHO. Counsel for Respondent-Insurer notified Claimant that

he would be requesting at hearing: (1) that all issues endorsed by Respondent-Insurer as issues for hearing are granted in Respondent-Insurer's favor, including withdrawal of its admissions on TTD due to fraud with a corresponding order compelling you to repay Respondent-Insurer all TTD benefits you received under this claim; (2) an order reducing the admitted AWW; (3) an order closing Claimant's claim on all issues, with prejudice; and (4) an order penalizing Claimant for each day he is in violation of PALJ Eley's order.

13. On April 5, 2022, counsel for Respondent-Insurer emailed Claimant documents that they noted may be submitted at hearing.

14. Hearing was set to commence on April 26, 2022 before ALJ Martinez Tenreiro. Mr. S[Redacted] appeared on behalf of Respondent-Insurer. Claimant appeared *pro se*. Claimant appeared with a family member who indicated she was an agent for Respondent-Employer, who was also *pro se.* Despite Respondent-Insurer's requests, OAC was unable to secure an interpreter for Claimant. As such, ALJ Martinez Tenreiro found good cause to continue the matter to another date. Claimant's family member provided limited interpreter services to explain to Claimant that the hearing would be continued to another date.

15. ALJ Martinez Tenreiro also spoke to Claimant in Spanish, giving him the *pro se* advisement. Claimant indicated that he was being represented by his attorney, Mr. T[Redacted]. Counsel for Respondent-Insurer clarified that Mr. T[Redacted] withdrew as counsel for Respondent-Employer. ALJ Martinez Tenreiro confirmed with Claimant that the order granting Mr. T[Redacted]'s Motion to Withdraw as Counsel was sent to the correct email address. Respondent-Insurer advised ALJ Martinez Tenreiro that Claimant had yet to provide responses to interrogatories in this matter. Claimant informed ALJ Martinez Tenreiro that he thought his attorney would be taking care of any issues and responses in this case. ALJ Martinez Tenreiro reiterated to Claimant that Mr. T[Redacted] was no longer representing him as counsel. On April 26, 2022 ALJ Martinez Tenreiro issued an order detailing the above and granting a 60-day continuance in the matter. She ordered, in relevant part:

1) Respondents will email a copy of the discovery requests to Claimant's email address within 3 days of this order.
2) Claimant shall respond to the Interrogatories to Claimant within twenty (20) days of the interrogatories being sent by email to Claimant. This order in no way restarts the timeline or timeframe to respond to prior ordered discovery pursuant to PALJ Eley's order dated September 28, 2021 compelling Claimant to respond to discovery, or any allegations that Respondents are due a penalty for failure to comply to PALJ Eley's order.
3) Claimant shall take affirmative steps to secure the services of an attorney or proceed to hearing *pro se* (self-represented) at the continued hearing.

(R. Ex. U, p. 244).

16. On April 27, 2022, Respondent-Insurer emailed Claimant a copy of the interrogatories and a copy of PALJ Eley's December 28, 2021 PHO.

17. The continued hearing proceeded before ALJ Kara R. Cayce on June 21, 2022. Mr. S[Redacted] appeared on behalf on Respondent-Insurer. Claimant appeared *pro se* on his behalf and on behalf of Respondent-Employer. A court interpreter was present. ALJ Cayce again gave Claimant the *pro se* advisement.

18. Mr. S[Redacted] identified the primary issue as penalties and sanctions for Claimant's the continuous violation of discovery orders. Respondent-Insurer requests a default judgment for the relief sought in their original Application for Hearing for continuous violation of PALJ Eley's discovery orders.

19. At hearing Claimant initially testified that he never saw the interrogatories and that he was unaware that Mr. T[Redacted] withdrew as counsel. He testified that he was surprised Mr. T[Redacted] was not present at the hearing before ALJ Martinez Tenriero. Claimant testified that, as of at least April 26, 2022, he was aware that Mr. T[Redacted] had withdrawn as counsel and that he did have a hearing set for June 21, 2022.

20. Claimant then testified that he did receive "letters" regarding his claim but that he never read the letters completely. Claimant testified that he did not recall when he received the letters. He testified that, due to the language barrier, he would ask his daughter to read the letters to him but she would not read the entire document to him. Claimant further testified that sometimes his daughter did not want to help translate the letters or to assist him. Claimant testified that Mr. T[Redacted] did, at one point, ask Claimant to respond to questions. He testified that it was his understanding was then that Mr. T[Redacted] would handle everything.

21. Claimant testified that he remembered attending the September 28, 2021 prehearing conference with PALJ Eley and at that time being instructed to answer interrogatories. He testified that at that prehearing conference he agreed he had not yet answered the interrogatories but that he would do so by October 12, 2021. Claimant confirmed that he did receive the follow-up letters from Respondent-Insurer's counsel. He testified that he did not provide the answers to interrogatories responses because his daughter did not tell him he needed to provide any response.

22. Claimant further testified that he was present at the April 26, 2022 hearing before ALJ Martinez Tenreiro at which time interrogatories were discussed. He acknowledged that ALJ Martinez Tenreiro told him he was being ordered to provide answers to the interrogatories within 20 days. He did not ask for Respondents to send a copy of the interrogatories in Spanish nor did he request that the ALJ order that the interrogatories to be sent in Spanish. Claimant confirmed that, as of the date of the hearing before ALJ Cayce, he had not provided answers to interrogatories to Respondent-Insurer.

23. At hearing Claimant confirmed his mailing and email address. All of the above referenced orders, pleadings and correspondence were properly served to Claimant at the correct mailing and email addresses.

24. The ALJ finds that Claimant willfully failed to comply with PALJ Eley's discovery orders. Respondents have proved by a preponderance of the evidence that penalties and sanctions are warranted.

CONCLUSIONS OF LAW

Generally

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

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

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

Penalties and Sanctions for Discovery Violations

WCRP 9-1(B)(2) provides that responses to interrogatories and production of documents shall be provided to all opposing parties within 20 days of mailing of the interrogatories and requests.

WCRP 9-1(F) provides that, if any party fails to comply with the provisions of WCRP Rule 9 and any action governed by it, an ALJ may impose sanctions upon such party pursuant to statute and rule. Once an order to compel has been issued and properly served upon the parties, failure to comply with the order to compel shall be presumed willful. WCRP Rule 9-1(G).

Section 8-43-207(1)(p), C.R.S. empowers ALJs to impose the sanctions provided in the Colorado Rules of Civil Procedure, except for civil contempt pursuant to rule 107 thereof, for willful failure to comply with any order of an ALJ issued pursuant to articles 40 to 47 of the Act.

It is undisputed that, as of the date of hearing, June 21, 2022, Claimant has not responded to interrogatories and requests for documents. Respondent-Insurer initially mailed interrogatories to Claimant on July 27, 2021. Thus, Claimant has far surpassed the 20-day deadline under WCRP 9-1(B)(2) for providing responses to interrogatories and production of documents. Claimant's failure to do so comes after multiple orders of ALJs compelling Claimant to provide responses and repeated requests of Respondent-Insurer. The preponderant evidence establishes that the orders compelling Claimant to respond to discovery were properly served. The documents reflect a mailing address and email address that Claimant confirmed were his correct addresses. Moreover, Claimant testified that he did receive documents regarding his claim.

Beyond the presumption that Claimant's failure to comply was willful due to his failure to comply with an ALJ's order, the preponderant evidence establishes the willful nature of Claimant's actions. Claimant attributes his failure to comply with the discovery orders to purported confusion over his legal representation, his limited proficiency in speaking and reading English, and a lack of assistance from his daughter. Some confusion or miscommunication due to the aforementioned reasons could be deemed reasonable in the first instance. Nonetheless, Claimant's alleged confusion does not serve as a valid or practical excuse for failure to comply over the course of several months, particularly considering that Claimant attended hearing at which an ALJ spoke to Claimant in Spanish and specifically reiterated he was not represented by counsel and ordered him to provide answers to interrogatories.

To the extent Claimant is not represented by counsel, Claimant has repeatedly been advised that a self-represented claimant is responsible to know the applicable rules and procedures and be prepared to accept the consequences of his own mistakes if he elects to represent himself. *In Dyrkopp v. Industrial Claims Appeals Office*, 30 P.3d 821 (Colo.App. 2001), *Manka v. Martin*, 200 Colo. 260, 614 P.2d 875 (1980).

Claimant effectively relies on the above excuses as some shield against any obligation on his part to be responsible for his claim and any litigation involving his claim. Claimant was able to proceed with filing a claim for workers' compensation and follow the requisite procedures to obtain medical and temporary indemnity benefits. Now, when faced with allegations of fraud and the possibility of having to repay overpaid benefits, Claimant effectively purports that he was not apprised of or did not understand his responsibilities. Claimant fails to take any accountability for his claim and his failure to comply with PALJ Eley's discovery order was willful. As such, sanctions are appropriate.

CRCP Rule 37(b)(2) provides:

> **Party Deponents-Sanctions by Court.** If a party or an officer, director, or managing agent of a party, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under section (a) of this Rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> **(A)** An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
>
> **(B)** An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;
>
> **(C)** An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;
>
> **(D)** In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;
>
> *** * ***
>
> In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order, or the attorney advising the party, or both, to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

Here, Respondents request sanctions for Claimant's failure to comply with a discovery order in the form of a default judgment.

The rules of civil procedure authorize default judgment in two circumstances: 1) where there is willful disobedience of discovery orders; and 2) when the default is requested by a party entitled to judgment and the other party has failed to plead or otherwise defend. CRCP 37(b)(2)(C); CRCP 55; *In the Interest of K.J.B., and Concerning K.B.*, 342 P.3d 597 (Colo.App. 2014); *Lopez v. Q3 Contracting Inc*., W.C. No. 5-049-938-003 (ICAO, Feb. 9, 2022).

The ALJ has wide discretion in determining whether a discovery violation has occurred and, if so, the appropriate sanction to be imposed. *See* § 8-43-207(l)(e) and (p), C.R.S.; *Sheid v. Hewlett Packard*, 826 P.2d 396 (Colo. App. 1991). While it is true that dismissal of one or more claims for relief may be a proper sanction under C.R.C.P. 37 (b)(2)(C), it is "the severest form of sanction" available. *See Prefer v. PharmNetRx*, 18 P.3d 844, 850 (Colo. App. 2000); *see also Sheid v. Hewlett Packard, supra*.

Based on the particular issues endorsed for hearing, the ALJ declines to impose the severest sanction of dismissal or default judgment here. A default judgment in this matter would permit Respondents to retroactively withdraw their admissions for TTD benefits due to fraud, terminate benefits, find an overpayment and order Claimant to repay such overpayment. Despite Claimant's willful violation of the discovery order, the ALJ concludes that a hearing should be conducted on the merits in this case to establish, *inter alia*, the existence of fraud and an overpayment. The ALJ acknowledges that, without Claimant's responses to discovery, Respondent-Insurer may be limited in its ability to fully present its' case. The ALJ further concludes that it is appropriate to impose sanctions in the form of prohibiting Claimant to call any witnesses on his behalf, other than himself, at hearing. Claimant shall also be required to pay the attorney fees Respondent-Insurer incurred to obtain the orders compelling answers to discovery.

ORDER

1. Claimant is barred from presenting fact or expert witnesses, except for Claimant's own testimony, at hearing in this matter.

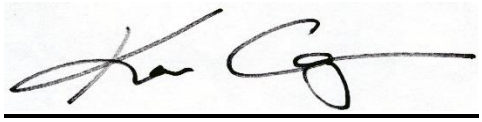
2. Claimant shall pay the attorney fees incurred by Respondent-Insurer to obtain the orders compelling answers to discovery. Respondent-Insurer may add determination of the amount of attorney fees as an issue for hearing.

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

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

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

DATED: September 6, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

1. Whether the claimant has demonstrated, by a preponderance of the evidence, that the left shoulder surgery recommended by Dr. Lindsay Harris is related to the admitted June 29, 2021 work injury.

2. Whether the claimant has demonstrated, by a preponderance of the evidence, that the left knee viscosupplementation injection recommended by Dr. Christopher Copeland is related to the admitted June 29, 2021 work injury.

STIPULATION

The parties have stipulated that the recommended surgery and injection are reasonable and necessary treatment for the claimant. The issue before the ALJ is whether these treatment modalities are related to the claimant's work injury.

FINDINGS OF FACT

1. On June 29, 2021, the claimant was involved in a single vehicle accident while he was operating a water truck in the normal performance of his job duties. The brakes failed on the water truck the claimant was driving. As a result, the claimant drove the vehicle off the road and into an embankment. During this time, the vehicle rolled. The claimant did not lose consciousness at the time of the accident and was able to extract himself from the vehicle.

2. The claimant first sought medical treatment after the accident on July 2, 2021. On that date, the claimant was seen in the emergency department (ED) at Community Hospital. The claimant reported a number of symptoms including stiffness in his neck, left shoulder, and left hip, and pain and swelling in his left knee. X-rays of the claimant's cervical spine, left hip, left knee, and left shoulder showed no fractures. The left knee x-ray showed osteoarthritis and a joint effusion. The left shoulder x-ray showed mild acromioclavicular and glenohumeral arthropathy. The claimant was advised to use ice and anti inflammatories.

3. The claimant's authorized treating physician (ATP) for this claim is Dr. Theodore Sofish. The claimant first saw Dr. Sofish on July 16, 2021. At that time, the claimant reported pain in his left knee, left hip, left shoulder, and neck. Dr. Sofish referred the claimant to physical therapy for his neck, left shoulder, and lumbar spine. He also ordered magnetic resonance imaging (MRI) of the claimant's left knee.

4. On August 2, 2021, an MRI of the claimant's left knee showed extensive complex lateral meniscus tear with extrusion, grade 3 chondral changes, a large joint effusion, and a small popliteal cyst.

5. On August 3, 2021, the claimant returned to Dr. Sofish. On that date, Dr. Sofish identified the claimant's diagnoses as cervical spine sprain, lumbar spine sprain, left shoulder sprain, and left knee sprain. He continued to recommend physical therapy for the claimant's cervical spine and left shoulder. Dr. Sofish also referred the claimant for an orthopedic evaluation of the left knee.

6. On August 16, 2021, the claimant was seen by Dr. Christopher Copeland for a consultation regarding his left knee. On that date, the claimant reported pain, swelling, and catching in his left knee. Dr. Copeland opined that the claimant's work injury resulted in an "acute traumatic exacerbation" of the pre-existing degenerative joint disease in the left knee. Dr. Copeland recommended a steroid injection. The medical records entered into evidence indicate that injection was administered on October 18, 2021.

7. On August 18, 2021, Dr. Sofish recommended an MRI of the claimant's left shoulder.

8. On August 24, 2021, the respondents filed a General Admission of Liability regarding the claimant's June 29, 2021 injury.

9. On October 12, 2021, the claimant was seen by Dr. Peter Scheffel for a consultation regarding his left shoulder. The claimant reported pain over the posterior and superior aspects of his left shoulder. The claimant also reported pain with overhead activities. Dr. Scheffel diagnosed a chronic rotator cuff tear. He recommended a steroid injection into the subacromial space. That injection was administered to the claimant's left shoulder on November 9, 2021.

10. On January 24, 2022, the claimant returned to Dr. Copeland. The claimant reported that the left knee injection administered in October provided two to three weeks of relief. Dr. Copeland recommended a viscosupplementation injection. The respondents have denied authorization for that injection.

11. On December 8, 2021, the claimant was seen by Dr. Sofish and requested a second opinion regarding his left shoulder. Dr. Sofish referred the claimant to Dr. Lindsay Harris for that second opinion.

12. On December 29, 2021, the claimant was seen by Dr. Harris. The claimant reported that prior to the June 29, 2021 injury he worked in physically demanding jobs in the construction industry without weakness or pain in his left shoulder. Dr. Harris noted that the claimant had undergone conserative treatment including physical therapy, a home exercise program, and a subacromial steroid injection. Dr. Harris identified the claimant's diagnoses as complete rotator cuff tear of the left shoulder, not specified as traumatic; and secondary osteoarthritis of the left shoulder due to rotator cuff

arthropathy. Dr. Harris further noted that the claimant has chronic supraspinatus and infraspinatus tears. Dr. Harris opined that the claimant's "acute injury seems to have set him on the course of intractable pain and dysfunction that is impacting his work." Ultimately, Dr. Harris recommended surgical intervention that would include a superior capsular reconstruction.

13. On March 9, 2022, the claimant attended an independent medical examination (IME) with Dr. William Ciccone, II. In connection with the IME, Dr. Ciccone reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. Dr. Ciccone opined that the claimant suffered a minor sprain/strain to his left shoulder on June 29, 2021. Dr. Ciccone further opined that the claimant has returned to his pre-injury baseline with regard to his left shoulder. In support of his opinions, Dr. Ciccone noted that the claimant has a symmetrical range of motion of his shoulders, with excellent strength. Dr. Ciccone noted that the claimant has chronic rotator cuff pathology with glenohumeral arthritis. With regard to the surgery recommended by Dr. Harris, it is Dr. Ciccone's opinion that the claimant's need for left shoulder surgery is not work related.

14. With regard to the claimant's left knee, Dr. Ciccone opined that the claimant has chronic arthritis and degenerative tearing in his left knee. Those conditions are pre-existing and are not related to the claimant's work injury. It is Dr. Ciccone's opinion that the claimant suffered a minor sprain/strain to his left knee on June 29, 2021. Additional treatment of the claimant's left knee, although reasonable, is not related to the work injury.

15. Dr. Ciccone's deposition testimony is consistent with his written report. Dr. Ciccone reiterated his opinion that although the claimant needs both modalities of treatment (the recommended shoulder surgery and knee injection) the claimant's need for treatment is not from his work injury, but rather from the claimant's pre-existing shoulder and knee conditions. Dr. Ciccone also testified that although the claimant had specific acute injuries to his shoulder and knee on the date of this rollover accident, the claimant has returned to his baseline condition. Therefore, the claimant's current need for medical treatment is not due to his work injuries.

Prior Medical Treatment

16. On December 26, 2013, x-rays were taken of the claimant's bilateral knees. The x-ray of the claimant's left knee showed severe lateral joint space narrowing with near bone-on-bone arthritis. That same x-ray also showed peripheral osteophytes both medially and laterally. Both knees were shown to have osteophytic changes in the patellofemoral joint, with the left worse than the right.

17. On February 17, 2015, the claimant was seen by Dr. Jeffrey Nakano for bilateral knee pain. In the medical record of that date, the claimant reported that his right knee bothered him more than his left. Dr. Nakano diagnosed degenerative joint disease in both of the claimant's knees. He also noted that the claimant's right knee was severe

in the medial compartment, while the left knee was severe in the lateral compartment. The claimant was advised to use anti inflammatories.

18. The claimant testified that he was aware that he had arthritis in his knees. He also testified that in 2015, his right knee was bothering him more than his left knee. The claimant further testified that although his physician discussed treatment options (including pain medications, injections, bracing, or surgery) he did not pursue any of those modalities because his condition was not bad enough to merit treatment.

19. Between 2015 and his employment with the employer in 2021, the claimant worked in the oil and gas industry performing physically demanding work. The claimant testified that during that time he did not have to modify his work activities as a result of left knee or left shoulder discomfort. During that time, the claimant occasionally experienced bilateral knee discomfort in the morning, or when it was cold. However, those knee symptoms were not disabling. The claimant also testified that he was never denied recertification for a commercial driver's license (CDL).

20. On October 16, 2020, the claimant completed a pre-employment physical examination and physical fitness test for a different employer, Ensign. During that test, the claimant engaged in physical activities, including balancing on each leg, ascending flights of stairs, lifting weights, bending, squatting, riding an elliptical bike, and carrying weighted objects. This included lifting 50, 75, and 100 pound weights from the floor to the table 10 times, five times, and four times, respectively. The claimant passed every portion of this testing. The claimant testified that if he were asked to perform that test now, he would be unable to perform the tasks.

21. Between his start date with the employer, but before the June 29, 2021 work injury, the claimant was able to physically perform all of his job duties with no issues.

22. The ALJ takes administrative notice of WCRP 17 and the Colorado Medical Treatment Guidelines (MTG). Section E(2)(a) of the Lower Extremity Injury Guidelines defines aggravated osteoarthritis as "[s]welling and/or pain in a joint due to an aggravating activity in a patient with pre-existing degenerative change in a joint. In addition, the MTG provide that an occupational relationship may be established by a change in the patient's baseline condition and a relationship to work activities. Section C(2) of the Shoulder Injury Guidelines indicate that an occupational shoulder injury may result from a specific incident or injury, aggravation of a previous symptomatic condition, or a work-related exposure that renders a previously asymptomatic condition symptomatic and subsequently requires treatment.

23. The ALJ credits the claimant's testimony regarding the nature and onset of his left shoulder and left knee symptoms. The ALJ credits the medical records and the opinions of Drs. Copeland and Harris over the contrary opinions of Dr. Ciccone. The ALJ finds that the claimant had demonstrated that it is more likely than not that the left shoulder surgery recommended by Dr. Harris is intended to cure and relieve the effects of the admitted work injury. The ALJ also finds that the claimant had demonstrated that

it is more likely than not that the left knee viscosupplementation injection recommended by Dr. Copeland is intended to cure and relieve the effects of the admitted work injury.

CONCLUSIONS OF LAW

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

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

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

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

5. An otherwise compensable injury does not cease to arise out of a worker's employment simply because it is partially attributable to the worker's pre-existing condition. *See Subsequent Injury Fund v. Thompson*, 793 P.2d 576, 579 (Colo. 1990); *Seifried v. Indus. Comm'n*, 736 P.2d 1262, 1263 (Colo. App. 1986) ("[I]f a disability were 95% attributable to a pre-existing, but stable, condition and 5% attributable to an occupational injury, the resulting disability is still compensable if the injury has caused

the dormant condition to become disabling."); *cited by Sanchez v. Industrial Claim Appeals Office*, No. 15CA1481C (Colo. App. Mar. 17, 2016).

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

7. As found, the claimant has demonstrated, by a preponderance of the evidence, that the left shoulder surgery recommended by Dr. Harris is related to the admitted June 29, 2021 work injury.

8. As found, the claimant has demonstrated, by a preponderance of the evidence, that the left knee viscosupplementation injection recommended by Dr. Copeland is related to the admitted June 29, 2021 work injury.

ORDER

It is therefore ordered:

1. The respondents shall pay for the shoulder surgery recommended by Dr. Harris, pursuant to the Colorado Medical Fee Schedule.

2. The respondents shall pay for the injection recommended by Dr. Copeland, pursuant to the Colorado Medical Fee Schedule.

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

Dated September 8, 2022.

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

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

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

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

ISSUES

1. Whether Respondents have established by a preponderance of the evidence grounds for withdrawal of their admission of liability on the basis of fraud.

2. Whether Claimant should be ordered to repay Respondents for benefits paid to Claimant or on his behalf.

FINDINGS OF FACT

1. On April 18, 2022, Claimant sought treatment at Care Now Urgent Care for pain of the left shoulder, which he stated he had been experiencing since April 12. Claimant represented that the injury occurred at work on April 12, 2022. Claimant reported he was running to answer a phone, slipped on oil on the floor and hit his left shoulder on a wooden door. (Ex. C). Claimant denied any similar problems in the past, denied that any non-work-related event or illness contributed to the symptoms, and denied past fractures to the region. John Keeling, PA-C diagnosed a displaced fracture to the mid-shaft of the left humerus based on the radiology findings. He referred Claimant to an arm specialist, to be seen later that day on an urgent basis. (Ex. C).

2. Claimant saw orthopedic surgeon Christopher Joyce, M.D. later on April 18, 2022. Claimant reported to Dr. Joyce a similar mechanism of injury, indicating he was running to answer a phone when he slipped and hit his left arm and head on a door. Dr. Joyce diagnosed a displaced proximal third humeral shaft fracture with significant angulation and displacement of the left arm. Dr. Joyce recommended an open reduction and internal fixation (ORIF) of the left proximal humerus. (Ex. E).

3. On April 19, 2022, Claimant reported the incident to Insurer, resulting in a First Report of Injury. Claimant indicated the incident occurred at 6:00 AM on April 12, 2022, when he slipped on the floor and fell into shelving. (Ex. H).

4. On April 21, 2022 Dr. Joyce performed an ORIF procedure of the left humeral shaft. In his operative report, Dr. Joyce indicated that although Claimant reported the fracture was 10 days-old, "this did not appear to be the case intra-operatively." Claimant had developed a "severe amount of scarring and soft tissue callus as well as essentially a pseudoarthrosis at the fracture site consistent with a humeral shaft nonunion." Dr. Joyce indicated the surgery lasted approximately 30% longer "due to the severe amount of scar tissue present that was unexpected." (Ex. F).

5. On April 26, 2022, Insurer's adjuster, SP[Redacted] filed a General Admission of Liability (GAL) for the alleged April 12, 2022 left arm injury. (Ex. I). Ms. SP[Redacted] testified the prior adjuster obtained a statement from Claimant in which Claimant represented he slipped and fell when rushing to answer a phone call. Ms.

SP[Redacted] was assigned the claim on April 19, 2022, and authorized the request for surgery on that date. Ms. SP[Redacted] testified she left messages with Claimant on April 19, April 22, and April 25, 2022, but Claimant did not return her calls.

6. Ms. SP[Redacted] testified that after filing the GAL on April 26, 2022, she received an after-hours voicemail from Mr. Keeling in which he relayed suspicions that Claimant's injury was not work related.

7. The following day, April 27, 2022, Jessica Leitl, M.D., Mr. Keeling's supervising physician emailed Ms. SP[Redacted]. Dr, Leitl reported that records within the HCA healthcare system indicated Claimant was seen at the Swedish Medical Center emergency department ("Swedish") on March 19, 2022 for a left mid-shaft humeral fracture sustained on that date. Dr. Leitl opined it was unlikely Claimant's left humeral fracture was work-related, or that it occurred on April 12, 2022. (Ex. G). Dr. Leitl provided Ms. SP[Redacted] with Claimant's March 19, 2022 medical record from Swedish.

8. On March 19, 2022, Claimant was seen at the Swedish emergency room and reported he fell that day while intoxicated and sustained an injury to his left arm. Claimant had swelling and deformity of the left mid-humerus. (Ex. A). X-rays taken at Swedish on March 19, 2022 showed a displaced oblique fracture involving the proximal third of the left humerus shaft. (Ex. B) Claimant was placed into a long arm splint with sling and discharged. (Ex. A). The injury Claimant sustained on March 19, 2022, is the same injury as that treated by Mr. Keeling, and Dr. Joyce, and which Claimant falsely represented arose out of the course of his employment with Employer.

9. Insurer paid $21,905.84 in medical benefits for Claimant's alleged work-related left humerus fracture. Insurer paid no indemnity benefits. (Ex. J).

10. Claimant did not sustain a compensable work injury on April 12, 2022. Claimant misrepresented to Respondents that he sustained a left arm injury on April 12, 2022. The ALJ further finds that Claimant misrepresented the cause of his injury with the intent to fraudulently obtain workers' compensation benefits, inducing the Respondents' GAL and payment of $21,905.84 in benefits to which Claimant was not entitled.

CONCLUSIONS OF LAW

Generally

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

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

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

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

Withdrawal of General Admission of Liability for Fraud

When respondents attempt to modify an issue previously determined by an admission, they bear the burden of proof for the modification. § 8-43-201(1), C.R.S.; *see also Salisbury v. Prowers County School Dist.*, W.C. No. 4-702-144 (ICAO June 5, 2012); *Barker v. Poudre School Dist.*, W.C. No. 4-750-735 (ICAO July 8, 2011). Section 8-43-201(1), C.R.S., provides, in pertinent part, that "a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification." The amendment to § 8-43-201(1), C.R.S. placed the burden on the respondents and made a withdrawal the procedural equivalent of a reopening. *Dunn v. St. Mary Corwin Hosp.*, W.C. No. 4-754-838-01 (ICAO Oct. 1, 2013). Respondents must, therefore, prove by a preponderance of the evidence that the Claimant did not suffer a compensable injury as defined under Colorado law. § 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979).

A compensable injury is one that arises out of the course and scope of employment with one's employer. §8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v.*

Irlando, 811 P.2d 379, 383 (Colo. 1991). The question of whether the requisite causal connection exists is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000). *Fuller v. Marilyn Hickey Ministries, Inc.,* W.C. No. 4-588-675 (ICAO Sept. 1, 2006

Respondents have established by a preponderance of the evidence grounds for withdrawal of the GAL. The evidence demonstrates the left humerus fracture Claimant represented as arising from the course of his employment with Employer did not occur as alleged. Claimant's injury occurred on or about March 19, 2022, when he was intoxicated and fell. No evidence was admitted indicating Claimant's injury arose out of the course of his employment with Employer. Accordingly, Respondents' request to withdraw the April 26, 2022 GAL is granted.

Overpayment

In *Vargo v. Indus. Comm'n*, 626 P.2d 1164,1166 (Colo. App. 1981), the court held that where a claimant makes fraudulent representations concerning the occurrence of an industrial injury, and the fraudulent representations induce the filing of an admission of liability, the admission is void *ab initio*.

The ALJ has authority to remedy fraud by requiring a claimant to repay benefits already received. *Cody v. ICAO,* 940 P.2d 1042 (Colo. App. 1996). In the case of medical benefits paid to third-parties, the ALJ possesses independent authority to remedy fraud by ordering repayment by Claimant to Insurer for all medical benefits paid to third parties as a result of Claimant's fraudulent misrepresentations. *Stroman v. Southway Services, Inc.,* W.C. No. 4-36-989 (ICAO August 31, 1999).

Respondents, as the party seeking to withdraw their GAL and obtain repayment, bear the burden of proving the elements of fraud by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The elements of fraud or material misrepresentation are: (1) A false representation of a material existing fact, or a representation as to a material fact with reckless disregard of its truth; or concealment of a material existing fact; (2) Knowledge on the part of one making the representation that it is false; (3) Ignorance on the part of the one to whom the representation is made, or the fact concealed, of the falsity of the representation or the existence of the fact; (4) Making of the representation or concealment of the fact with the intent that it be acted upon; (5) Action based on the representation or concealment resulting in damage. *Arczynski v. Club Mediterranee of Colo., Inc.*, W.C. No. 4-156-147 (ICAO Dec. 15, 2005), *citing Morrison v. Goodspeed*, 68 P.2d 458, 462 (Colo. 1937). "Where the evidence is subject to more than one interpretation, the existence of fraud is a factual issue for resolution by the ALJ." *Arczynski, supra.*

The ALJ finds that Respondents have established by a preponderance of the evidence that Claimant obtained workers' compensation benefits by fraud. Claimant made false representations to Respondents and his health care providers that he sustained a left arm injury when he slipped on oil and fell into either a door or shelves in the course of his employment on April 12, 2022. As found, the injury actually occurred on March 19, 2022, when Claimant fell while intoxicated. Given Claimant sought medical care on March 19, 2022 for the same injury, the ALJ concludes it is more likely than not Claimant knew that his representation that the injury occurred on April 12, 2022 in the course of his employment was false. Insurer was not aware that Claimant's representation was false until April 27, 2022, when Ms. SP[Redacted] received Claimant's medical records from Swedish. Claimant represented the injury was work-related to Insurer with the intent of receiving workers' compensation benefits. Insurer, in reliance on Claimant's representations paid $21,905.84 in medical benefits for Claimant's alleged work-related left humerus fracture. The ALJ concludes Respondents have established the elements of fraud by a preponderance of the evidence rendering the GAL void *ab initio*. Because Claimant obtained workers' compensation benefits by fraud, Respondents are entitled to repayment of all benefits.

Repayment Terms

In *Simpson v. Indus. Claim Appeals Office*, 219 P.3d 354 (Colo. App. 2009), *rev'd on other grounds*, *Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777 (Colo. 2010), the Colorado Court of Appeals held that with regard to overpayments, the ALJ has discretion to fashion a remedy. Further, the ALJ has the authority to determine the terms of repayment and the ALJ's schedule for recoupment will not be disturbed absent an abuse of discretion. See *Louisiana Pacific Corp. v. Smith*, 881P.2d 456 (Colo. App. 1994). Claimant did not present evidence regarding his ability to repay. Because no credible evidence exists in the record from which the ALJ can determine whether a payment schedule is appropriate, the ALJ orders that Claimant shall repay Insurer $21,905.84 within 60 days of the date of this Order.

ORDER

It is therefore ordered that:

1. Respondents General Admission of Liability is void ab initio due to Claimant's fraudulent representations.

2. Claimant is hereby ordered to pay Respondents $21,905.84 within sixty days of the date of this Order.

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

certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 8, 2022

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

ISSUES

- Did Respondents overcome the DIME's impairment rating by clear and convincing evidence?
- If Respondents overcame the DIME, what is the correct rating, if any?
- Did Claimant prove entitlement to a general award of medical benefits after MMI?

STIPULATIONS

The parties stipulated to an overpayment of $7,670.30 for TTD benefits paid after the date of MMI. Respondents may offset the TTD overpayment against any PPD benefits awarded. If no PPD is awarded, the parties agreed to reserve recoupment of the overpayment for future determination. Respondents advanced $1,400 for Claimant's DIME after an indigency determination and are entitled to a credit for the DIME fee against any PPD owed.

FINDINGS OF FACT

1. Claimant worked for Employer as a Customer Data Technician. He serviced network infrastructure and equipment, primarily in the field. He drove Employer's vans and trucks, including a Ford F-550 bucket truck, to reach remote job sites.

2. Claimant suffered admitted injuries on November 2, 2019 when he slipped and fell on an icy sidewalk. He fell backward and landed on his buttocks and back. His head whipped backward and stuck the pavement. Claimant is unsure whether he lost consciousness, but if so, it was very brief. He felt severe pain in his neck. He got up and went to his vehicle, where he rested for a while until he felt able to continue working. He then drove to his next service call and completed the assignment.

3. Upon returning to the company garage at the end of his shift to drop off his service vehicle, Claimant noticed he was "listing to the left" when he walked. That evening, Claimant experienced worsening dizziness, difficulties with balance, nausea, and vomiting. He went to sleep and hoped he would feel better the next day.

4. The dizziness and vomiting continued the next morning. He also had a headache and neck pain. He went back to sleep and remained in bed for most of the day.

5. On the evening of November 3, 2019, Claimant was transported by ambulance to the Memorial Hospital emergency department. His primary complaints were "profound dizziness," photophobia, and neck pain. His gait was unsteady and he had difficulty ambulating without assistance. Claimant had a Glasgow Coma score of 15, consistent with a mild traumatic brain injury ("mTBI"). Cervical x-rays showed

degenerative changes but no acute fracture. A head CT showed no acute intracranial pathology. Claimant was admitted to the hospital because of the persistent dizziness and difficulty with ambulation.

6. Claimant remained hospitalized for five days. He was discharged from the hospital on November 8, 2019 with diagnoses including vertigo, anxiety, eye floaters, and a head injury. His symptoms of diplopia, headache, and vertigo had persisted throughout his admission but were "somewhat improved." Claimant was sent to the acute rehabilitation center for ongoing vestibular and post-concussive therapy. He remained at the rehab facility for seven days.

7. Claimant was referred to Concentra for authorized treatment. He saw PA-C Tianna Voros at the initial evaluation on November 19, 2019. Claimant identified his head, neck, and low back as the symptomatic areas on his initial paperwork and pain diagrams. He was still feeling dizzy, unsteady, and had double vision when he looked quickly to the right. Significant examination findings included impaired balance, positive Romberg sign, finger to nose dysmetria on the left side, and unsteady gait drifting to the left. Examination of the neck showed tenderness of the left trapezius and limited range of motion. Claimant already had appointments scheduled with physical therapy, vestibular therapy, and a neuro-optometry evaluation with Dr. Joshua Watt. Claimant was diagnosed with a closed head injury, post concussive syndrome, and a cervical strain. He was put on work restrictions and advised to keep his already-scheduled appointments with therapy and Dr. Watt. For unknown reasons, his low back was not addressed.

8. Claimant returned to Concentra on December 12, 2019 and saw Dr. Daniel Peterson. He was still having dizziness, photophobia, double vision, constant headaches, neck pain, and low back pain. Claimant described "brain fogginess but no confusion," and easy fatigability. The physical examination findings were largely unchanged. Dr. Peterson added a diagnosis of post-traumatic headache.

9. Claimant underwent a neuro-optometric evaluation with Dr. Watt on December 30 and 31, 2019. Dr. Watt documented oculomotor dysfunction with deficiencies of pursuit and saccadic eye movements, binocular convergence insufficiency, and vertical strabismus. He diagnosed post-concussion syndrome with vision complications, and opined Claimant's visual deficits were "100% related" to the work accident.

10. On January 14, 2020, Dr. Peterson ordered two adjustable canes for persistent "vestibular dizziness." Claimant later switched to walking sticks because "he feels like less of an easy mark this way."

11. Claimant was evaluated by Dr. Timothy Sandell, a physical medicine and rehabilitation specialist, on January 21, 2020. He described problems with balance, vertigo, and dizziness since the accident. He also reported neck and low back pain from the fall. Dr. Sandell observed balance issues while examining Claimant. There was palpable tenderness in the cervical paraspinals, upper trapezius, and lumbar paraspinals. Dr. Sandell recommended PT for Claimant's neck and low back, and an EMG to evaluate

possible L5 radiculopathy. At a follow up appointment two weeks later, Dr. Sandell opined Claimant's neck and back pain were probably musculoskeletal. He reiterated the recommendation for PT.

12. Claimant was evaluated by Dr. Diane Hesselbrock, a neurologist, on March 12, 2020.[1] Dr. Hesselbrock noted some "inconsistencies" in Claimant's examination. She recommended he increase Gabapentin and continue therapies.

13. On March 16, 2020, Claimant started psychological treatment with Dr. Anthony Ricci.

14. Claimant followed up with Dr. Peterson on March 24, 2020. Dr. Peterson had recently spoken with Dr. Watt and the vestibular therapist, both of whom thought Claimant was making slow progress. Examination of Claimant's neck showed increased lordosis, tenderness to palpation of the paraspinal muscles, bilateral muscle spasms, and reduced ROM. Dr. Peterson referred Claimant to Dr. Mark Meyer, an interventional pain management specialist, for the headaches and neck pain.

15. A cervical MRI on April 16, 2020 showed multilevel degenerative changes, most pronounced at C5-6 and C6-7.

16. Claimant's initial appointment with Dr. Meyer was on April 29, 2020. Dr. Meyer noted Claimant's symptoms were "classic" for post-concussive syndrome. He opined Claimant's neck pain was consistent with a whiplash injury and facet arthropathy aggravated by trauma. Claimant's headaches were most consistent with post-concussive headache. Dr. Meyer recommended cervical facet injections, and suggested Claimant increase the Gabapentin for the headaches.

17. Claimant followed up with Dr. Hesselbrock on May 14, 2020. Claimant had increased his gabapentin dose but made his dizziness and nausea worse. He was still having dizziness and diplopia when looking to the side despite participating in vision and vestibular therapy. Claimant described split-second episodes of "blacking out" while walking that caused him to lose balance briefly. Dr. Hesselbrock noted Claimant's exam findings were "not completely explained by a neurologic process or vestibulopathy." She encouraged Claimant to continue vision therapy for the diplopia. She also suggested adding duloxetine to help with the headaches.

18. On June 16, Dr. Peterson noted the neuro-optometry testing strongly suggested visual pathway disturbance, but Claimant had not improved appreciably with vision therapy. He wondered about a conversion disorder given Claimant's lack of sustained response to multiple treatments. Dr. Peterson agreed with Dr. Meyers' recommendation for cervical facet injections or medial branch blocks (MBBs).

19. Dr. Meyer performed right-sided MBBs at C5, C6, and C7 on July 9, 2020. Claimant had temporary relief for several hours. Dr. Meyer opined Claimant's

[1] Dr. Hesselbrock's records were not offered into evidence, so all information regarding her evaluations and findings is gleaned from reports of other providers.

presentation and examination were consistent with C5-6 and C6-7 facet arthropathy. Based on Claimant's symptoms, examination findings, and response to the MBBs, Dr. Meyer recommended intra-articular injections "facilitate recovery from the post whiplash facet pain."

20. On July 16, 2020, Claimant asked Dr. Peterson why he never received the PT for his low back recommended by Dr. Sandell despite consistently reporting back pain on his pain diagrams. Dr. Peterson double-checked the chart and ordered PT for Claimant's low back. He also referred Claimant for a neuropsychological evaluation. For unknown reasons, the neuropsychological evaluation was never completed. Significant physical exam findings included palpable tenderness and muscle spasm in the cervical paraspinal muscles, impaired balance, and a positive Romberg sign.

21. Claimant had approximately seven PT sessions for his low back.

22. On July 20, 2020, Dr. Hesselbrock documented that Claimant has "good days and bad days with walking."

23. Dr. Peterson referred Claimant to Dr. Meyer for evaluation of his low back. Dr. Meyer opined Claimant's presentation was most consistent with SI joint dysfunction, but his right-side gluteal pain and right leg pain suggested L5 radiculopathy. Dr. Meyer ordered a lumbar MRI.

24. After reviewing the lumbar MRI results, Dr. Meyer recommended a surgical consultation. Dr. Peterson referred Claimant to Dr. Michael Rauzzino, a spine surgeon.

25. Claimant saw Dr. Rauzzino on October 20, 2020. Dr. Rauzzino noticed Claimant had some difficulty with memory and balance. He became dizzy when his extraocular movements were checked. He had pain with palpation and "very limited" cervical and lumbar ROM. Lumbar x-rays showed central and foraminal stenosis but no large herniation. Dr. Rauzzino noted Claimant had primarily axial back pain. He did not think surgery would help but stated, "I would like to see the pictures to be sure." Review of the cervical CT and MRI showed no obvious cause for his neck pain except for multilevel degenerative changes that "may have been exacerbated by the work injury." Ultimately, Dr. Rauzzino concluded Claimant was "better served with nonsurgical options."

26. Dr. Meyer recommended a lumbar epidural steroid injection (ESI). The scheduled injection had to be canceled because of Claimant's high blood sugar levels. Claimant later cancelled the second scheduled injection because he was "scared" of a bad outcome after performing a Google search. Dr. Meyer tried to explain the low relative risk and recommended that Claimant reconsider his decision. However, Claimant never pursued the ESI.

27. Dr. Meyers' final diagnoses regarding Claimant's neck included "on-going cervicalgia consistent with whiplash injury," cervical spondylosis, post-traumatic headache, and traumatic arthropathy.

28. Claimant had his last regular psychological counseling session with Dr. Ricci in October 2020. The issues addressed during the course of treatment included adjustment disorder, anxiety, and "post-concussion sequelae." Dr. Ricci put Claimant on a "prn schedule" but encouraged periodic telephone or in-person consultations "to maintain the gains he has made, and prevent decompensation." Dr. Ricci offered no opinion regarding restrictions or limitations specifically related to psychological issues.

29. Dr. Peterson put Claimant at MMI on January 19, 2021. He anticipated Claimant would have permanent impairment and referred him for a rating evaluation with Dr. Lawrence Lesnak. Dr. Peterson's physical examination showed paraspinal cervical tenderness and limited cervical ROM, positive right straight leg raise, tenderness around the L5 level, and limited lumbar ROM. Regarding work restrictions, Dr. Peterson opined Claimant "is disabled and unable to work." Dr. Peterson released Claimant from treatment and stated Dr. Lesnak would determine his maintenance care needs.

30. Dr. Lesnak performed an impairment evaluation on March 8, 2021. He saw no clinical evidence of cervical facet pathology or SI dysfunction, and opined Claimant's subjective complaints of neck and low back pain were unsupported by objective findings. Dr. Lesnak opined Claimant does not qualify for a Table 53 rating for the lumbar or cervical spine. He opined Claimant might have suffered a mild closed head injury but had no reproducible objective findings to support his complaints. Dr. Lesnak described significant discrepancies between Claimant's gait during clinical examination and when seen entering and exiting the office. He stated Claimant was able to heel walk and toe walk without difficulty and did not fall during the examination. He opined other observed instances of imbalance appeared "voluntary" and "intentional." He concluded Claimant was at MMI with no impairment, no work restrictions, and no need for further treatment.

31. Claimant requested a DIME, which was performed by Dr. Thomas Higginbotham on July 13, 2021. Claimant described significant restriction on his daily activities because of injury-related symptoms, including frequent dizziness, headaches, and fatigue. Claimant stopped driving because of the dizziness and relied on public transportation or rides from family and friends. Dr. Higginbotham noted no exaggerated pain behaviors. He opined Claimant's appearance, presentation, and "body language" during the exam, including distraction testing, were "appropriate based on his condition." Claimant demonstrated significant balance problems. Musculoskeletal examination showed tenderness and increased tonicity in the cervical and lumbar area. Cervical and lumbar ranges of motion were reduced in all planes. Dr. Higginbotham provided injury-related diagnoses including: (1) post-concussion syndrome with oculomotor dysfunction, visuospatial disorientation, post-traumatic headache, and vestibular basilar disorder dizziness, nausea, and imbalance; (2) cervical myofascial strain; (3) lumbosacral strain/sprain superimposed on discogenic disease with right lower extremity radicular complaints; and (4) situational adjustment reaction the aggravation of pre-existing depression and anxiety.

32. Dr. Higginbotham agreed Claimant reached MMI on January 19, 2021. However, he disagreed with Dr. Lesnak's assessment of no impairment. Dr. Higginbotham provided a 47% whole person rating, composed of the following elements:

Cervical:	18% WP [4% Table 53(II)(B), 15% ROM]
Lumbar:	20% WP [7% Table 53(II)(C), 14% ROM]
Vestibular:	15% WP [Class 3, p. 178]
Mental Imp.:	6%
Combined rating:	47%

33. Explaining his rationale for the rating, Dr. Higginbotham noted Claimant fell directly on his back, and his head whipped backward and struck the ground. Claimant reported neck and back pain shortly after the accident, and had treatment directed to both areas. There was no evidence of any preinjury neck or back pain or limitations. Dr. Higginbotham gave significant weight to Dr. Watt's testing and treatment, noting, "neuro-optometry evaluation is very difficult to feign." Dr. Higginbotham opined Claimant's oculomotor dysfunction is consistent with closed head trauma and is likely contributing to the ongoing dizziness, nausea, and imbalance.

34. Dr. Lesnak reevaluated Claimant on October 11, 2021. His impressions were similar to the prior evaluation. He disagreed with Dr. Higginbotham's determination that Claimant had ratable impairment from the work accident. Dr. Lesnak thought Claimant significantly and purposefully exaggerated his balance problems and functional impairment. He pointed to episodes where Claimant was at times walking normally and at other times "falling into walls." Dr. Lesnak opined there was a "strong likelihood" of a somatoform disorder or conversion disorder based on the lack of reproducible objective findings to correlate with Claimant's ongoing complaints. He reiterated that Claimant is at MMI with no impairment and no need for further treatment.

35. Claimant attended a functional capacity evaluation (FCE) in September 2021. The therapist observed Claimant changed positions frequently because of neck and back pain, and his balance was "extremely compromised" despite using two walking sticks. Claimant satisfied the consistency and validity requirements of 29 of 30 tests, indicating reliable results. The FCE showed Claimant is functioning at the sub-sedentary physical demand level, with limited tolerance for sustained activities because of balance issues, pain, and fatigue.

36. Dr. Kathy D'Angelo performed an IME for Respondents on January 19, 2022. She opined the course of Claimant's condition did not fit the expected pattern of TBIs and musculoskeletal injuries. Dr. D'Angelo stated she found no clinical abnormalities on examination and opined there is no physiologic basis for Claimant's reported symptoms. As part of her IME, Dr. D'Angelo reviewed extensive video surveillance footage taken in October and November 2021. She opined Claimant's presentation on the video was inconsistent with his presentation at the IME and to other medical providers. She pointed to instances where Claimant demonstrated cervical and lumbar motion greater than shown on formal testing by the DIME. She dismissed portions of the videos that show difficulties with balance and ambulation because she believes Claimant repeatedly spotted the investigator and knew he was under surveillance. Like Dr. Lesnak, she perceived an "apparent conscious attempt to appear as if he had problems with balance." She stated, "At best, [Claimant's] intermittent 'stumbling' gait is functional and

not organic. At worst it is an intentional performance to exaggerate his condition." Dr. D'Angelo agreed with Dr. Lesnak that Claimant is at MMI with no impairment, no permanent restrictions, and no need for additional treatment.

37. Dr. Lesnak, Dr. D'Angelo, and Dr. Higginbotham testified at hearing and by deposition to elaborate on the opinions and conclusions expressed in their reports.

38. Dr. Lesnak was shown several portions of the video surveillance during the hearing. He opined Claimant's activities and movements on the videos were dramatically different from his described limitations and the balance issues he demonstrated in Dr. Lesnak's office. This confirmed Dr. Lesnak's belief that Claimant's alleged balance problems are not related to any neurological abnormality, because "neurologic conditions are not transient . . . . My only explanation is . . . an underlying symptom somatic disorder or somatoform disorder, which could explain his seemingly intentional or volitional acts of ambulation and unsteadiness while seeing certain health care providers."

39. Dr. D'Angelo echoed Dr. Lesnak's impressions of the inconsistencies seen in the video. She stated episodes of normal gait intermixed with a stumbling gait pattern is not indicative of a true neurologic abnormality. But Dr. D'Angelo ultimately diagnosed a conversion disorder rather than factitious disorder or malingering. Dr. D'Angelo opined the conversion disorder is unrelated to the work accident, and therefore does not qualify for an impairment rating.

40. Dr. D'Angelo reiterated she sees no basis for any permanent spinal impairment rating. She opined there is no objective basis for cervical or lumbar spine rating under Table 53, which precludes any ROM-based spinal rating.

41. Dr. Higginbotham opined Claimant had an "obvious" injury to his neck when he fell and whipped his head backward. Claimant complained of neck pain immediately, which persisted through the date of the DIME. Numerous providers documented neck issues and provided treatment. As pertains to the lumbar rating, he disagreed with Dr. Lesnak's statement that Claimant only started complaining of back pain in July 2020. He pointed to Claimant's first pain diagram at Concentra that endorsed stabbing pain in his low back. He also cited Dr. Sandell's records from January 2020 recommending PT for the back and an EMG to evaluate L5 radicular symptoms. Claimant repeatedly indicated low back pain on later visits, but those complaints were not acted on until he pressed the issue in July 2020. Although Dr. Higginbotham believes Claimant's back pain is primarily myofascial, he opined the accident fall probably "aggravated the degenerative joint problems" shown on the lumbar MRI. Dr. Rauzzino saw no surgical lesion but did recommend conservative treatment. And Dr. Meyer recommended lumbar ESIs.

42. Turning to the vestibular rating, Dr. Higginbotham noted Claimant was initially hospitalized for five days and in a rehab facility for seven days, primarily because of persistent dizziness and imbalance. Testing by Dr. Watt revealed significant oculomotor deficits, which Dr. Watt opined were "100% related" to the work accident. Dr. Higginbotham noted that visual problems and poor balance have been a central theme

throughout Claimant's course of treatment. He was also personally impressed by Claimant's poor balance exhibited during the DIME.

43. After watching the video shown at hearing, Dr. Higginbotham "softened" the vestibular rating from 15% to 10%. He opined Class 2 is more appropriate than Class 3 as he originally applied. He made no changes to the other components of the rating.

44. Regarding the 6% psychological rating, Dr. Higginbotham relied on Dr. Ricci's diagnosis of situational adjustment disorder with anxiety and depression. Dr. Higginbotham agreed Claimant had taken Lexapro before the work injury for generalized anxiety and had documented interpersonal difficulties. Dr. Higginbotham conceded he did not specifically evaluate Claimant's preinjury "baseline" psychological functioning. He did not specifically discuss with Claimant the extent to which psychological issues affected his function, but based the rating on his "clinical sense."

45. Dr. Lesnak and Dr. D'Angelo opined there is no evidence of functional limitations related to a psychological condition. To the extent Claimant has difficulties in areas of function addressed on the Mental Impairment worksheet, those limitations are related to physical problems of disequilibrium, vision, neck pain, and back pain. Dr. Lesnak and Dr. D'Angelo opined the DIME failed to account for Claimant's pre-injury history of psychological issues and interpersonal difficulties, which had required medication and interfered with his work. Dr. D'Angelo testified Claimant told her he could not sleep because of headaches, and he described no anxiety related to transportation. Dr. D'Angelo explained the psychological rating is improper "double dipping" because for example, Claimant's concerns about being operating a vehicle is related to his subjective complaints of vertigo; there is no evidence of a psychiatric condition preventing Claimant from driving. Dr. D'Angelo testified this was "giving two ratings for the same alleged issue."

46. Dr. Lesnak and Dr. D'Angelo agreed Dr. Higginbotham committed no "technical" errors in computing the rating, such as selecting an incorrect percentage from the rating tables or applying the wrong category of impairment. They simply believe Claimant has no ratable impairment related to the work accident.

47. This is a complex case, and multiple treating and examining providers have reached dramatically different conclusions regarding Claimant's level of function and impairment. The ALJ neither fully credits nor fully discredits any provider who has opined in this case. Dr. Lesnak and Dr. D'Angelo are highly persuasive regarding the psychological impairment rating. Dr. Higginbotham is more persuasive regarding the cervical, lumbar, and vestibular ratings. The ALJ also gives considerable weight to Dr. Meyers' observations, opinions, and conclusions.

48. Respondents proved the DIME's 6% psychological impairment rating was highly probably incorrect. Respondents overcame the DIME by clear and convincing evidence.

49. Claimant proved by a preponderance of the evidence he suffered permanent impairment to his cervical spine, lumbar spine, and vestibular system, as

determined by Dr. Higginbotham in his report and testimony. Claimant has a 41% whole person impairment because of the November 2, 2019 industrial injury.

50. On March 23, 2022, Claimant lost his balance and fell. He hit his face on concrete and suffered a maxillary fracture. He was taken to the emergency room and later admitted to Cordera for treatment. However, Claimant is not seeking specific medical benefits at this time, but merely seeks a "general award" of medical benefits after MMI. Before the March 23 fall, there was no persuasive evidence Claimant required any treatment to relieve his condition or prevent deterioration of his condition. Under the circumstances, a purely "general award" would be interlocutory and advisory. The issue of medical benefits after MMI, including treatment related to the March 23, 2022 fall, shall be reserved for future determination.

CONCLUSIONS OF LAW

A. Respondents overcame the DIME's psychological rating

A DIME's determination regarding whole person impairment is binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(b) and (c). The clear and convincing standard also applies to the DIME's determination of whether impairments were caused by the work accident. *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1988). The party challenging a DIME's whole person rating must demonstrate it is "highly probable" the determination is incorrect. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). A party meets this burden if the evidence contradicting the DIME physician is "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002). A "mere difference of medical opinion" does not constitute clear and convincing evidence. *E.g., Gutierrez v. Startek USA, Inc*., W.C. No. 4-842-550-01 (March 18, 2016).

If the DIME issues multiple or conflicting ratings, the ALJ must first determine the DIME's true opinion as a question of fact. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). The DIME's "finding" of MMI or impairment may be found in the initial report, supplemental reports, or tesimony at a hearing or deposition. *Andrade v. Industrial Claim Appeals Office*, 121 P.3d 328 (Colo. App. 2005). Here, the DIME's "true" rating is includes the 10% vestibular rating discussed at the hearing, combined with the cervical, lumbar, and psychological ratings desribed in the DIME report.

As found, Respondents proved the DIME's the 6% psychological impairment rating was highly probably incorrect. Dr. Lesnak and Dr. D'Angelo's opinions on this issue are credible and persuasive. Although Claimant received psychotherapy from Dr. Ricci for several months, he was released in December 2020 with only "prn" follow up. There is no persuasive evidence from any treating provider to substantiate functional limitations or impairment because of psychological factors. Dr. Higginbotham conceded he did not discuss Claimant's psychological condition in detail and relied primarily on supposition and his "clinical sense." Most important, Dr. Higginbotham's rating violates the

requirement that the physician "rate *only* impairments due *strictly* to the psychiatric condition." (Emphasis added). No doubt, Claimant has impairment related to travel, sleep, and participating in recreational activities. But those limitations are related to the impact of his dizziness and attendant balance issues, chronic headaches, neck pain, and back pain. There is no persuasive evidence Claimant's function in those areas is impaired by a psychological condition. Dr. D'Angelo and Dr. Lesnak are highly persuasive that the DIME's 6% psychological rating constitutes impermissible "double dipping."

B. What the correct rating?

When the DIME rating is overcome "in any respect," the rating becomes a matter for the ALJ's determination based on the preponderance of the evidence. *Mosley v. Industrial Claim Appeals Office*, 78 P.3d 1150 (Colo. App. 2003); *Garlets v. Memorial Hospital*, W.C. No. 4-336-566 (September 5, 2001). The ALJ is not limited to merely choosing from competing ratings offered by Level II physicians, but may independently determine the rating based on the evidence in the case. *Garlets v. Memorial Hospital, supra*. The only constraint is that the rating must be supported by the evidence and consistent with the *AMA Guides* and other rating protocols. *Gallegos v. Lineage Logistics Holdings LLC*, W.C. No. 5-054-538-002 (February 11, 2020). Even if the ALJ finds the DIME rating has been overcome, the ALJ does not have to reject every other component of a DIME rating. *Lee v. J. Garlin Commercian Furnishings*, W.C. No. 4-421-442 (December 17, 2001).

Claimant proved by a preponderance of the evidence he suffered permanent impairment to his cervical spine, lumbar spine, and vestibular system, as determined by Dr. Higginbotham in his report and testimony.

1. 18% cervical rating

For the cervical spine, Dr. Higginbotham assigned a 4% Specific Disorder rating under Table 53(II)(B), combined with 15% for ROM deficits. Table 53(II)(B) provides a 4% rating for a non-surgical disc or soft-tissue injury with "a minimum of six months of medically documented pain and rigidity, with or without muscle spasm." Claimant had a well-documented injury with a whiplash mechanism, causing immediate and persistent neck pain. Multiple examinations showed paraspinal myofascial pain, muscle spasm, and ROM deficits. Reduced ROM provides objective evidence of "rigidity," particularly when done in the context of a rating evaluation. *Lopez v. Redi Services*, W.C. No. 5-118-981 & 5-135-641 (October 27, 2021). The DIME's ROM measurements were obtained per *AMA Guides* protocols and satisfied the internal validity criteria. There is no persuasive evidence Claimant had any functional impairment or limitations related to the underlying degenerative spine changes before the work accident. Dr. Higginbotham's opinion regarding cervical impairment is credible and more persuasive than the contrary opinions offered by Dr. Lesnak and Dr. D'Angelo.

2. 20% lumbar rating

For the lumbar spine, Dr. Higginbotham assigned a 7% Specific Disorder rating under Table 53(II)(C), combined with 14% for ROM deficits. Table 53(II)(C) provides a 7% rating for non-surgical disc or soft-tissue injuries with "a minimum of six months of medically documented pain and rigidity, with or without muscle spasm, associated with moderate to severe degenerative changes on structural tests." As Dr. Higginbotham persuasively explained, Claimant fell and "landed forcibly on his back." He reported low back pain from his first visit with Concentra. The back pain was confirmed by Dr. Sandell, who recommended PT and an EMG. Imaging studies confirmed moderate to severe degenerative changes. Dr. Meyers and Dr. Higginbotham credibly opined the degenerative condition was probably aggravated by the work accident. Dr. Meyers recommended ESIs, which were declined by Claimant for personal reasons. As with the cervical spine, there is no persuasive evidence that of pre-injury functional impairment or limitations related to the underlying degenerative changes in the lumbar spine. Claimant's lumbar ROM measurements were valid according to the *AMA Guides*. Dr. Higginbotham's opinions regarding lumbar impairment are credible and more persuasive than the contrary opinions offered by Dr. Lesnak and Dr. D'Angelo.

3. 10% vestibular impairment

Based on video shown at hearing, Dr. Higginbotham determined that Claimant's balance problems are less severe than described and demonstrated during the DIME evaluation. He amended his vestibular rating to 10% whole person, based on a Class 2 vestibular impairment. The class 2 category requires:

> (a) signs of vestibular disequilibrium are present with supporting objective findings; and (b) the usual activities of daily living are performed without assistance, except for complex activities such as bike riding or certain activities related to the patient's work, such as walking on girders or scaffolds.

The ALJ credits Dr. Higginbotham's opinion that Claimant has impairment for his ongoing dizziness and balance issues. Dr. Higginbotham persuasively explained that Dr. Watt's testing provides objective evidence of oculomotor dysfunction consistent with a closed head trauma, and is likely contributing to Claimant's ongoing dizziness with nausea and imbalance. Dr. Higginbotham personally observed significant balance problems during the evaluation, as have multiple other providers. The video also objectively shows "signs" of disequilibrium, with numerous balance issues and gait abnormalities on multiple days. Claimant easily satisfies the functional component of the Class 2 category, because his balance issues would unquestionably preclude complex activities such as riding a bicycle. Dr. Higginbotham and the FCE restricted Claimant from climbing ladders and from walking more than two hours, and he cannot reasonably be expected to engage in commercial driving. These limitations prevent Claimant from returning to his preinjury work.

Dr. Lesnak concluded Claimant's balance and gait problems are highly exaggerated and probably outright fabrications. Admittedly, portions of the video surveillance demonstrate greater functional abilities than generally described by Claimant. But there are also numerous instances of poor balance, slow and unsteady gait, and stopping to rest after walking short distances. The video prompted Dr. Higginbotham to lower his rating, but not to negate the rating altogether.

Dr. D'Angelo also expressed concern about purposeful exaggeration and possible malingering. However, in her deposition, she diagnosed a conversion disorder. Previously, Dr. Peterson had wondered about a conversion disorder, as had (apparently) Dr. Hesselbrock, and Dr. Lesnak. There may be merit to the theory that Claimant suffers from a conversion disorder, or at least a conclusion that psychological factors contribute to the severity of his balance and visual issues. A conversion disorder would actually explain quite a bit about Claimant's variable presentation and lack of response to treatment. Nevertheless, a conversion disorder represents a genuine, unconscious psychological response as opposed to purposeful falsification. As such, the functional limitations flowing from a conversion disorder are no less real or impactful than those from a "true" neurological disorder. Dr. D'Angelo's argument the conversion disorder is unrelated to the injury is not credible. She offered no persuasive theory of any alternate non-work-related stressor or issue that would have coincidentally caused Claimant to develop a conversion disorder immediately after falling and hitting his head. If, in fact, Claimant has a conversion disorder, it is probably caused by the work accident.

The preponderance of persuasive evidence established that Dr. Higginbotham appropriately provided a 10% vestibular rating to account for Claimant's persistent balance problems.

4. The correct rating is 41% whole person

Based on the Combined Values Chart on page 254 of the *AMA Guides*, Claimant has a 41% whole person impairment because of the November 2, 2019 industrial injury (20% combined with 18% = 34% combined with 10% = 41%).

C. Medical benefits after MMI

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

general award of medical benefits after MMI, subject to the respondents' right to dispute causation or reasonable necessity of any particular treatment. *Hanna v. Print Expediters, Inc.*, 77 P.3d 863 (Colo. App. 2003). The claimant must prove entitlement to post-MMI medical benefits by a preponderance of the evidence. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). A DIME is not entitled to special weight regarding medical treatment after MMI, but is simply another medical opinion to consider when evaluating the preponderance of the evidence. *See Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Story v. Industrial Claim Appeals Office*, 910 P.2d 80 (Colo. App. 1995).

As found, before his fall on March 23, 2022, there was no persuasive evidence Claimant required additional treatment to relieve the effects of his injury or prevent deterioration of his condition. No treating or examining provider credibly recommended any specific treatment. Although Dr. Ricci left open the possibility of "prn" counseling sessions, Claimant has not pursued that opportunity for over 18 months. Most important, Claimant received negligible benefit from numerous treatment modalities, and declined additional interventions recommended by Dr. Meyer for his neck and back. There is no persuasive reason to think Claimant would benefit from further treatment. Although Claimant may require some treatment for the worsened condition caused by the March 23, 2022 fall, Claimant is only seeking a "general award" of medical benefits after MMI at this time. Without a request for specific medical benefits, a general award would be interlocutory and advisory. Issues related to medical benefits after MMI, including treatment for the March 23, 2022 fall, will be reserved for future determination.

ORDER

It is therefore ordered that:

1. Claimant's claim for PPD benefits based on the DIME's 6% whole person psychological rating is denied and dismissed.

2. Insurer shall pay Claimant PPD benefits based on a 41% whole person rating for the cervical spine, lumbar spine, and vestibular dysfunction.

3. Insurer may take credit for $7,670.30 in TTD paid after MMI.

4. Insurer may take credit for the $1,400 advance payment for the DIME.

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

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

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

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

DATED: September 9, 2022

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

ISSUES

- Did Claimant prove he contracted COVID-19 arising out of and in the course of his employment?

- If Claimant's COVID-19 is compensable, was the treatment he received at the Parkview Medical Center emergency department on October 18, 2020 reasonably necessary emergency treatment?

FINDINGS OF FACT

1. Claimant works for Employer as a package delivery driver. He contracted COVID-19 in October 2020 and was hospitalized for three weeks. The primary dispute is whether Claimant contracted COVID because of his work.

2. Claimant worked out of Employer's facility in Pueblo, Colorado. He drove a rural route covering the southern portion of Pueblo and the areas around Beulah and Colorado City. The route serves primarily residential customers, with small number of businesses. Claimant worked 8 to 12-hour shifts, five days per week.

3. Employer was an "essential business" during the COVID-19 pandemic, so its operations continued after March 2020. Employer's package volume increased because so many people were shopping online.

4. Employer has several "pre-loaders" at the central facility to load packages onto the delivery vehicles. In mid-to-late 2020, Employer dispatched an average of 35 drivers from the Pueblo facility daily and used 18 pre-loaders. Because of the significant wage differential between pre-loaders and drivers, Employer's policy was that "pre-loaders load. Drivers drive and deliver." However, depending on the day's volume, drivers frequently load a relatively small number of packages onto their vehicles. Claimant testified he typically spent approximately 10-15 minutes to an hour helping load packages at the start of his shift.

5. Because Employer's business is not amenable to "remote work," most of its employees continued reporting to their regular worksites during the pandemic. However, Employer implemented several safety protocols to minimize the risk of COVID.

6. Before the pandemic, drivers generally attended a brief prework communication meeting ("PCM") at the start of each shift. These PCMs usually lasted approximately five minutes. In March 2020, Employer discontinued in-person PCMs, and instead communicated with the drivers electronically through their handheld "DIAD" computers.

7. The cabs of the package trucks, vehicle keys, and handheld DIADs were sanitized nightly. When drivers arrived at work in the morning, they would retrieve their wrapped keys and DIADs, and proceed to their delivery vehicles.

8. Employer implemented social distancing and instructed employees to remain at least six feet away from each other, to the extent possible. Pre-loaders were generally spaced between the front and back of large package trailers. It was relatively easy for drivers to socially distance because they were assigned to individual vehicles and had no known reason to spend much time roaming around the facility. Nevertheless, drivers spent some time in proximity to coworkers each morning before departing on their routes. Claimant testified he got within four feet of a coworker while loading packages in the mornings. Once on their routes, the drivers spent most of the day isolated in their package cars.

9. As another safety measure, Employer suspended the requirement to obtain customer signatures on the DIAD after making a delivery. Employer also implemented 2-week paid sick leave for COVID, so employees would not have to worry about losing wages or using their accrued leave it they reported having COVID.

10. Employer required employees to wear masks while on company property, including in the package cars. Compliance with the mask requirement was not perfect, and occasionally employees had to be admonished to wear their masks properly. Failing to wear masks was particularly problematic at the outdoor smoking area. Claimant does not smoke and there is no persuasive evidence he spent time in the smoking area. Several unidentified employees were disciplined between March 2020 and November 2020 for not wearing their masks properly. One employee was terminated for repeated violations over several months. The individual who was terminated worked as a pre-loader on the opposite end of the building from Claimant. There is no persuasive evidence Claimant was ever in close proximity to the terminated employee.

11. Claimant generally did not wear a mask while working his route, unless entering an establishment that required one. He testified he kept his mask in his pocket and donned the mask if he had contact with a customer. Claimant testified he unexpectedly encountered customers while making a delivery “maybe five times a day.” “On occasion” he was less than six feet from the customer. He later described the interactions as “not frequent” and “sporadic.” All of these momentary encounters occurred outdoors.

12. Claimant described a very isolated lifestyle in September and October 2020. Claimant testified he did not go to stores to shop and did his grocery shopping online. He testified he stopped eating out except for takeout. He testified he ordered Chinese takeout two or three times in October 2020, and picked up the food from the restaurant’s drive-through. Claimant testified he paid at the pump when purchasing gas.

13. Claimant lived with his wife, daughter, and son. As of the hearing, Claimant’s daughter was 19 and Claimant’s son was 27. Everyone in the household worked outside of the home in some capacity in September and October 2020. Claimant’s

family members will be referred to by their initials: Claimant's wife = "A.B."; Claimant's daughter = "K.B."; Claimant's son = "C.B."

14. A.B. held two part-time jobs. She worked as a CNA at a nursing home, and as a bus driver for Student Transportation of America.

15. In September 2020, she worked only 5.25 hours at the nursing home, on September 26. She did not work at the nursing home in October 2020.

16. A.B. worked the bus driver job during September and October 2020. She drove two routes in the morning and two in the afternoon. The first route had 10-12 elementary school students. The second route was 15-20 middle school students. In the afternoon, she reversed the process and transported the same groups of children home. Everyone on the buses wore masks, including A.B. She typically kept the driver's window open while driving. A.B. knows of no children on her bus that were sick with COVID in October 2020. However, in late September 2020, A.B. was exposed to a student who tested positive and had to quarantine.

17. There is conflicting evidence about where Claimant's son and daughter worked in September and October 2020. Claimant testified K.B. worked as a hostess and waitress at a pizzeria/bar but later testified she was working at a Baskin-Robbins instead. Similarly, Claimant testified C.B. worked at the Target distribution warehouse around September and October 2020, but previously told Respondents' IME that C.B. worked as a waiter at a pizzeria/bar.

18. On October 14, 2020, Claimant developed flu-like symptoms. He took OTC medication that evening and went to bed early. He worked the next day because he felt better and had no fever. On Friday, October 16, he awoke with a fever and felt worse, so he went to a testing facility for a COVID test. The test was later reported as positive.

19. On Sunday, October 18, Claimant was having difficulty breathing, so his wife took him to the emergency room at Parkview Medical Center. Claimant reported, "He may have had contact with ill people but does not recall any. He indicates that he is [a driver for] UPS, coming in contact with many people." Claimant's oxygen saturation was low and he required supplemental oxygen to keep his saturations above 90%. Claimant was admitted to the hospital.

20. A.B. and K.B. developed COVID symptoms after Claimant was admitted to the hospital. K.B. was tested for COVID on October 19, and A.B. was tested on October 20. Both tests were positive. A.B. and K.B. had "mild" cases of COVID and recovered uneventfully. C.B. never developed symptoms and tested negative.

21. Claimant spent three weeks in the hospital. On November 8, 2020, Dr. Villalba at Parkview Hospital documented Claimant had improved and was almost ready for discharge. Dr. Villalba stated, "per CDC after 20 days individuals are no longer considered contagious." Claimant was discharged from the hospital on November 9, 2020.

22. [Redacted, whereinafter Mr. R], a senior claims adjuster with Insurer, spoke with Claimant by telephone on November 11, 2020. Mr. R[Redacted] credibly testified Claimant was lucid and had no apparent difficulty conversing or remembering recent events. Claimant told Mr. R[Redacted] he wore a mask at work and "used" to get Clorox wipes to sanitize the package car "but not anymore." Claimant did not know where he got the virus. He was unware of anyone at UPS who had symptoms or tested positive. Claimant explained that before catching COVID, he was shopping for groceries online and having them loaded into his car. He said "he only goes to work and comes home." Claimant told Mr. R[Redacted] his wife drives a school bus and was exposed to a student who tested positive and had to quarantine (the ALJ infers it was the student who had to quarantine). This exposure occurred three weeks before Claimant became ill (*i.e.*, approximately the last week of September 2020). Claimant provided an accurate timeline to Mr. R[Redacted], starting with his onset of symptoms on October 14, through his release from the hospital on November 9, 2020. Claimant told Mr. R[Redacted] that A.B.[Redacted] tested positive for COVID on "Wednesday 10/14." He also stated K.B.[Redacted] later tested positive, and C.B. [Redacted] tested negative. Claimant could not recall the exact dates of K.B.[Redacted] and C.B.[Redacted]'s COVID tests.

23. Nicole Balducci is an occupational health nurse with Employer. In October 2020, she was assigned to track Employer's COVID cases. One of her tasks was to perform contact tracing of any employees who contracted COVID. According to CDC guidelines only those individuals who were within six feet of the infected employee for 15 minutes or greater would need to quarantine. Ms. Balducci did not perform formal contact tracing regarding Claimant's COVID infection because she could not speak with him to learn whether he had been in close contact with anyone at work. She considered it a HIPAA violation to reveal Claimant's COVID status and inquire around the worksite without his permission. However, Ms. Balducci had access to Employer's records regarding COVID cases at all facilities in the district, which includes Colorado. She confirmed that, besides Claimant, no other actual or potential COVID cases were documented at the Pueblo facility. Nor was she informally aware of any COVID cases.

24. Claimant saw Dr. Mark Paz for an IME at Respondents' request on January 3, 2022. Claimant told Dr. Paz he had limited contact with people before contracting COVID. Claimant stated he had stopped going to church and attending family gatherings, which upset his wife. It is unclear whether his wife and children were also avoiding those situations, or just Claimant. Claimant told Dr. Paz Employer did not enforce its mask mandate and "routinely" held morning meetings in "confined places." He said he "argued frequently" with management about non-compliance with social distancing and masking. Despite these alleged shortcomings with the health and safety protocols, Claimant stated he knew of no co-workers who were infected with and/ or symptomatic with COVID.

25. Dr. Paz opined it is not medically probable Claimant became infected with COVID because of a work related exposure. He explained asymptomatic individuals can spread COVID before they develop symptoms. The highest period of transmissibility is from two days before and one day after symptoms appeared. However, transmission can also occur outside of those windows. Dr. Paz noted Claimant's only known exposure to individuals with COVID occurred with his own family members, particularly his wife. He opined it is impossible to calculate a probability that Claimant was exposed to COVID at

work. Accordingly, Claimant's COVID cannot be attributed to his employment to the level of medical probability.

26. [Redacted, whereinafter Mr. T[Redacted] is the business manager for Employer's centers in Pueblo, Canon City, Trinidad, La Junta, and Lamar. Mr. T[Redacted] testified at hearing regarding Employer's COVID safety policies and protocols in 2020. Mr. T[Redacted]'s testimony was credible and more persuasive than Claimant's testimony, to the extent of any conflicts.

27. Claimant failed to prove he contracted COVID arising out of and in the course of his employment.

CONCLUSIONS OF LAW

To receive compensation or medical benefits, a claimant must prove he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). The claimant must prove his work directly and proximately caused the condition for which he seeks benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The claimant must prove entitlement to benefits by a preponderance of the evidence. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The mere fact that an employee experiences symptoms while working does not compel an inference the work caused the condition. *Scully v. Hooters of Colorado Springs*, W.C. No. 4-745-712 (October 27, 2008). There is no presumption that a condition which manifests at work arose out of the employment. Rather, the Claimant must prove a direct causal relationship between the employment and the injury. Section 8-43-201; *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989). A claimant need not provide expert medical opinion evidence and can support a claim by any competent evidence. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983).

As found, Claimant failed to prove his COVID-19 infection was proximately caused by his work. Employer implemented multiple safety protocols to minimize the risk of COVID transmission at its facilities. Mr. T[Redacted]'s testimony was credible. Claimant's allegation that Employer routinely disregarded COVID safety is uncorroborated by any persuasive evidence. Employer's efforts ultimately proved successful, as Claimant had the only case of COVID at the Pueblo facility between March 2020 and November 2020. Although compliance with masking and social distancing may not have been perfect, there is no persuasive evidence any such lapses caused Claimant to be exposed to COVID. Because the persuasive evidence shows Claimant was the only person at the workplace to contract COVID, he probably did not catch COVID from a coworker. And Claimant spent the lion's share of each day isolated in a package car, with only "infrequent," "sporadic," and brief interactions with customers, primarily in outdoor settings, an even less likely source of COVID infection.

Everyone in Claimant's household was working outside the home in September and October 2020. K.B. worked at a Baskin-Robbins or as a waitress, either of which would involve serving the public. A.B.'s job required her to spend several hours in a bus

with 25-32 schoolchildren. According to Claimant's own statement, at least one child tested positive for COVID and had to quarantine. A.B.'s job was at least as likely a potential source of COVID exposure as Claimant's job.

Claimant and two members of his household contracted COVID within days of each other. Claimant presented no expert opinion evidence regarding COVID-19 incubation rates, or other persuasive evidence to support his theory that he must have been the first family member exposed to COVID because he was the first to become symptomatic. Although a claimant does not have to present expert evidence to prove causation, the presence or absence of such evidence is a legitimate factor to consider when evaluating the preponderance of the evidence. Here, the only expert causation opinion was provided by Dr. Paz, who concluded causation cannot be established to a level of medical probability, notwithstanding the timing of who became symptomatic first. Indeed, the variability of individual response to COVID is vividly illustrated by Claimant's household in which his son never contracted COVID, A.B. and K.B. had only "mild" symptoms, but Claimant was hospitalized for three weeks.

Although it is certainly possible Claimant contracted COVID because of his work, the persuasive evidence fails to establish a causal connection is "more likely than not."

ORDER

It is therefore ordered that:

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

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

DATED: September 13, 2022

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

ISSUES

Whether Claimant has demonstrated by a preponderance of the evidence that lumbar L4-L5 posterior spinal fusion surgery as requested by Sanjay Jatana, M.D. is reasonable, necessary and causally related to his admitted July 30, 2020 industrial injury.

FINDINGS OF FACT

1. Claimant is a 41-year-old male who works as a service technician for Employer. On July 30, 2020 Claimant was driving a 2017 Ford F-150 truck on Highway 85 during the course and scope of his employment. When Claimant approached an intersection, he was cut-off by a box truck. Claimant testified he slammed his brakes and turned right before impact. He struck the box truck side-to-side. Claimant estimated he was traveling around 60 miles per hour at the time of the Motor Vehicle Accident (MVA).

2. Claimant did not initially seek medical treatment because he wanted to determine whether his back pain would improve over the weekend. He returned to work on Monday, but his symptoms became more severe. Claimant thus obtained treatment at Authorized Treating Physician (ATP) UC Health on August 4, 2022. Claimant was diagnosed with acute bilateral lower back pain with right-sided sciatica. X-rays did not reveal any acute bone defects or abnormalities. The lumbar spine appeared well-aligned and the prosthetic intervertebral disc at L5-S1 appeared normal. Providers recommended physical therapy.

3. Claimant underwent prior lower back surgery in approximately 2002 or about 18 years before his July 30, 2020 work injury. He specifically had an artificial disc replacement at L5-S1. Claimant testified that, after the surgery, he experienced occasional symptoms of lower back pain and soreness. However, the pain was minimal compared to his symptoms after the July 30, 2020 MVA.

4. Claimant was eventually referred to orthopedic spine specialist John Tobey, M.D. for treatment of his July 30, 2020 MVA. Claimant first visited Dr. Tobey for an evaluation on September 15, 2020. Dr. Tobey noted that Claimant had previously undergone an artificial disc replacement at L5-S1 that had not been symptomatic prior to the July 30, 2020 MVA. Claimant reported severe lower back pain on the right side. He remarked that he was undergoing physical therapy and dry needling. Dr. Tobey found no evidence of radiculopathy or myelopathy and noted significant overlying myofascial pain. He suspected that the pain might be emanating from the facet joints at L4-L5 and L5-S1. He recommended a trial of steroids and would consider bilateral L4-L5 and L5-S1 facet joint injections in the future. Dr. Tobey recommended continued physical and massage therapy.

5. On October 6, 2020 Claimant filed a request for a change of physician to Rafer Leach, M.D. Respondents approved the request, but there was some overlap involving treatment with Dr. Tobey.

6. On October 28, 2020 Dr. Tobey commented that Claimant's EMG results were only mildly abnormal and showed a very mild right ulnar neuropathy at the elbow. There was no evidence of right cervical or lumbosacral radiculopathy. There was also no evidence for peripheral neuropathy. Dr. Tobey noted that Claimant did not receive any benefit from facet joint injections and would consider an epidural injection.

7. On December 10, 2020 Claimant visited Dr. Leach for an examination. Claimant reported mild neck pain with radicular numbness and tingling to the right medial hand. He also had moderate to severe back pain with radicular pain to the right gluteal region as well as radicular numbness and tingling in the right leg. Dr. Leach commented that Claimant's cervical MRI revealed degenerative disc disease and facet arthropathy. At C4-C5 there was mild left and moderate to severe right foraminal stenosis. Dr. Leach referred Claimant for a thoracic spine MRI without contrast.

8. On January 20, 2021 Claimant was evaluated at Dr. Leach's MSK Medical facility by Nils Foley, M.D. Claimant noted his back pain was constant and moderate to severe at an 8-9/10 level. His symptoms continued to radiate into the right lower extremity. Dr. Foley recommended continued physical therapy, chiropractic care and lumbar decompressions. He also referred Claimant to Sanjay Jatana, M.D. at Orthopedic Centers of Colorado for a neurosurgical consultation.

9. On February 17, 2021 Claimant visited Dr. Jatana for an evaluation. The cervical spine MRI showed disc degeneration and central protrusions at C4-C5 and C5-C6 that produced moderate to severe right-sided neural foraminal stenosis at C4-C5 and mild bilateral stenosis at C5-C6. Otherwise there were mild degenerative changes at C3-C4 around the facet joints. An MRI of the lumbar spine was difficult to interpret due to a significant artifact caused by the disc arthroplasty at L5-S1. However, the disc appeared desiccated and had decreased signal and height. It was also hard to determine whether there was a disc protrusion on the right side. However, radiology reports revealed a central disc extrusion at L4-L5. Finally, Dr. Jatana remarked that the thoracic MRI showed a degenerate protrusion from T-6 through T-9 and a small thoracic syrinx at T11-T12. He recommended C4-C6 transforaminal epidural steroid injections and L4-L5 bilateral transforaminal epidural steroid injections to ascertain Claimant's pain generator. Dr. Jatana also recommended a lumbar discogram to determine whether the pain was discogenic and arising from the L4-L5 level if the injections were not helpful. Treatment options included a revision back surgery involving an anterior discectomy and disc arthroplasty at L4-L5 if it was confirmed as the pain generator.

10. On March 6, 2021 Claimant was admitted to the hospital for abdominal pain. He was diagnosed with an unrelated perforated sigmoid colon and diverticulitis. Claimant underwent a Hartman's procedure and colostomy. He experienced an uneventful recovery for a period of time that interfered with immediate follow-up for his cervical and lumbar spine.

11. On August 23, 2021 Claimant returned to Dr. Leach for an examination. Dr. Leach ordered an additional lumbar MRI to address Claimant's new report of urinary incontinence. Notably, the previous MRI was one year-old and Claimant was due to follow-up with Dr. Jatana for possible clearance for lumbar discography and surgical intervention. The new MRI was completed on August 29, 2021 and generally showed the same result previously identified. At L4-L5 there was mild disc space narrowing and desiccation with a mild symmetric disc bulge and a small superimposed central disc extrusion. There was also mild bilateral facet hypertrophy without significant central canal or foraminal stenosis.

12. On November 23, 2021 Claimant visited Michael Janssen, D.O. for a Physician Advisor evaluation. After reviewing Claimant's medical records Dr. Janssen assessed Claimant with "nonspecific cervical and lumbar dysfunction without clear-cut evidence of an anatomical condition related to" the July 30, 2020 MVA. He specified that the MVA did not cause the disc desiccation, result in the concern of a syrinx on the MRI, and did not cause the anatomical findings identified as a pain generator for his underlying condition. Specifically, although Claimant may have had myofascial symptomatology, there was no structural abnormality directly related to the July 30, 2020 MVA. In specifically addressing the proposed discectomy, Dr. Janssen concluded that the procedure was probably a reasonable option. In considering the proposed surgery, he reasoned that "it does not appear that there is any indication for cervical spinal reconstructive surgery as it relates to the accident. It is unknown whether or not the lumbar spine disc (pending discography) is truly related" to the July 30, 2020 MVA.

13. On January 31, 2022 Claimant visited Dr. Jatana for a follow-up appointment. Dr. Jatana remarked he had reviewed Dr. Janssen's report and agreed that, based on Claimant's response to the transforaminal epidural steroid injections, a discography was no longer necessary. He noted Dr. Janssen's conclusion that Claimant's conditions were not causally related to the MVA. Dr. Jatana responded that he had no comment regarding the cause of Claimant's current symptoms or treatment since the July 30, 2020 MVA. He remarked that Claimant said he was doing well prior to the MVA without significant pre-existing lower back pain. Claimant attributed his current symptoms to the MVA and sought continued treatment. Dr. Jatana thus recommended an L4-L5 discectomy with an anterior lumbar procedure and disc arthroplasty. Because Claimant had undergone surgery in the G.I. tract as well as a previous anterior exposure at L5-S1, he recommended consultation with an access surgeon to determine whether an anterior approach was even feasible. If the approach was not feasible they would proceed with a posterior approach.

14. On February 22, 2022 Physician Advisor Dr. Janssen reviewed the prior request for surgery and did not believe that an anterior procedure was appropriate. He consulted with an access physician who noted that Claimant was 220 pounds with a colostomy and previous anterior retroperitoneal approach at L5-S1. There was thus a high risk of exposing the L4-L5 level with an anterior interbody fusion. Dr. Janssen noted that Dr. Jatana did not have an opinion on the cause of Claimant's conditions. Moreover, He expressed concern that Claimant's case did not meet the Colorado Division of

Workers' Compensation Medical Treatment Guidelines (MTGs) for the Lower Back. Notably, options other than reconstruction of a degenerative, non-traumatic, non-occupational condition should be considered.

15. On March 7, 2022 Dr. Jatana reviewed Dr. Janssen's report that Claimant's condition was not work-related and revision anterior exposure was not worth the risk. Dr. Jatana noted that Claimant had failed nonsurgical treatment and had received concordant diagnostic L4-L5 epidural steroid injections. He commented that the L4-L5 level had been identified as the pain generator. Dr. Jatana thus recommended a posterior lumbar fusion at the L4-L5 level.

16. Based upon Dr. Janssen's opinion, Respondents denied Claimant's surgical request. Claimant then filed an Application for Hearing seeking approval of the proposed fusion procedure.

17. On June 1, 2022 Claimant underwent an independent medical examination with Brian E.H. Reiss, M.D. Dr. Reiss considered Claimant's medical records and conducted a physical examination. After reviewing the November 27, 2021 MRI of Claimant's lumbar spine, he noted the findings were very minimal without any nerve root contact of significance. There was only minor degeneration at L4-L5. Dr. Reiss explained that none of the preceding findings would account for any lower extremity complaints. Instead, the findings were degenerative and pre-existing. Dr. Reiss remarked that Claimant had done little in the way of physical therapy. Specifically, Claimant did not undertake any significant active exercises in the form of core strengthening or aerobic conditioning that would be the most appropriate treatment method. Furthermore, Claimant acknowledged during the interview and examination that he did little to no exercise and was quite likely deconditioned. Dr. Reiss reasoned that Claimant probably suffered myofascial pain that was worsened by deconditioning. A fusion and/or disc replacement was thus highly unlikely to significantly improve his condition.

18. Dr. Reiss explained that, while it is possible that the MVA aggravated Claimant's lumbar condition to some extent, his lumbar symptomatology was partially pre-existing and partially persistent on the basis of a lumbar strain, deconditioning and psychological factors. He remarked that there were no new objective findings on imaging and Claimant's subjective complaints appeared to be out of proportion to objective findings. Claimant noted 6-7/10 pain without the corresponding appearance of expected pain behaviors.

19. Dr. Reiss also testified at the hearing in this matter. He explained that Claimant's MRI findings were normal for a person of his age, showed some degeneration and there was no nerve contact of significance. Notably, the findings were minor and not related to any specific trauma. Furthermore, December 10, 2020 flexion and extension imaging only showed minor degeneration, no instability and nothing acute. In contrast, Dr. Reiss detailed that the medical records from November 2019 showed acute symptomatology, contrary to what Claimant told him at the independent medical examination. Specifically, the medical records from November 2019 reveal that

Claimant's symptoms continued for at least 10 days and were somewhat significant. Notably, the symptoms were not triggered by any particular event or aggravation.

20. Dr. Reiss concluded that Claimant's request for surgery, particularly a fusion, did not meet the requirements of the MTGs. Notably, no specific pain generator had been sufficiently identified. Dr. Reiss commented that, in the absence of instability and degeneration, a fusion was very unlikely to provide any relief and was no more likely to offer improvement beyond other conservative care. Dr. Jatana's proposed posterior fusion surgery at L4-L5 would place additional stress on the previous L5-S1 disc replacement and make Claimant's back more symptomatic. Dr. Reiss concluded that he had a number of concerns about a surgical fusion and the procedure would likely not improve Claimant's condition.

21. Although Claimant stated to Drs. Jatana, Tobey and Reiss that he had no lower back pain prior to his July 30, 2020 MVA, medical records reveal that he has previously experienced lower back symptoms. Specifically, providers from Family Physicians of Greeley on November 5, 2019 assessed Claimant with acute left-sided lower back pain without sciatica. The providers noted that Claimant had a history of previous degenerative disc disorder. Claimant underwent x-rays of the lumbar spine and began anti-inflammatories and Flexeril at night. There was no injury associated with Claimant's symptoms and his condition was aggravated by changing positions including rolling over in bed and twisting.

22. At hearing Claimant confirmed that he suffered prior lumbar symptoms. Claimant reported that he performed construction and had tweaked his back in November of 2019. The symptoms were significant enough that he was concerned that a screw may have been damaged at the L5-S1 level. He also underwent x-rays. Claimant acknowledged that the artificial disc replacement he received at L5-S1 could contribute to problems at higher levels and cause degeneration. He noted that his back would become sore in the past when he overworked, particularly when he twisted or bent.

23. Claimant has failed to demonstrate it is more probably true than not that lumbar L4-L5 posterior spinal fusion surgery as requested by Dr. Jatana is reasonable, necessary and causally related to his admitted July 30, 2020 industrial injury. Initially, Claimant was involved in a work-related MVA on July 30, 2020 and experienced back pain. He underwent conservative treatment in the form of physical therapy and injections, but continued to experience symptoms. Claimant's lumbar MRI revealed mild disc space narrowing and desiccation with a mild symmetric disc bulge and a small superimposed central disc extrusion at L4-L5. There was also mild bilateral facet hypertrophy without significant central canal or foraminal stenosis. Treating physicians Drs. Tobey and Leach did not make any surgical recommendations. However, Dr. Leach ultimately referred Claimant to Dr. Jatana for a surgical consultation.

24. After reviewing Claimant's medical records, Dr. Jatana determined that Claimant had failed nonsurgical treatment and undergone concordant diagnostic L4-L5 epidural steroid injections. He commented that the L4-L5 level had been identified as the pain generator. Dr. Jatana thus recommended a posterior lumbar fusion at L4-L5. Notably, however, Dr. Jatana had no comment regarding the cause of Claimant's current

symptoms or treatment since the July 30, 2020 MVA. He remarked that Claimant said he was doing well prior to the MVA without significant pre-existing lower back pain.

25. Despite Dr. Jatana's surgical request, the persuasive medical opinions reflect that Claimant has failed to demonstrate that lumbar L4-L5 posterior spinal fusion surgery is reasonable, necessary and causally related to his admitted July 30, 2020 industrial injury. After reviewing relevant medical records, Dr. Janssen assessed Claimant with "nonspecific cervical and lumbar dysfunction without clear-cut evidence of an anatomical condition related to" the July 30, 2020 MVA. He specified that the MVA did not cause the disc desiccation, result in the concern of a syrinx on the MRI, and did not cause the anatomical findings identified as a pain generator for Claimant's underlying condition. Specifically, although Claimant may have had myofascial symptomatology, there was no structural abnormality directly related to the July 30, 2020 MVA. Dr. Janssen determined that "it does not appear that there is any indication for cervical spinal reconstructive surgery as it relates to the accident. It is unknown whether or not the lumbar spine disc (pending discography) is truly related" to the July 30, 2020 MVA.

26. Similarly, after conducting an independent medical examination, Dr. Reiss concluded that Claimant's lower back symptoms were not causally related to his MVA. Initially, Dr. Reiss explained that Claimant's MRI findings were normal for a person of his age, showed some degeneration and there was no nerve contact of significance. Notably, the findings were minor and not related to any specific trauma. Furthermore, December 10, 2020 flexion and extension imaging only showed minor degeneration, no instability and nothing acute. Dr. Reiss explained that none of the preceding findings would account for any lower extremity complaints. He reasoned that Claimant likely suffered myofascial pain that was worsened by deconditioning. A fusion and/or disc replacement was thus highly unlikely to significantly improve his condition. Furthermore, Dr. Reiss concluded that Claimant's request for fusion surgery did not meet the requirements of the MTGs. Notably, no specific pain generator had been sufficiently identified. Dr. Reiss commented that, in the absence of instability and degeneration, a fusion was very unlikely to provide any relief and was no more likely to provide improvement than other conservative care. Finally, Dr. Jatana's proposed posterior fusion surgery at L4-L5 would place additional stress on the previous L5-S1 disc replacement and make Claimant's back more symptomatic.

27. The medical records also reveal that Claimant has suffered from pre-existing back symptoms. Importantly, Claimant underwent a prior lower back surgery in approximately 2002 or about 18 years before his July 30, 2020 work injury. He specifically had an artificial disc replacement at L5-S1. Although Claimant stated to Drs. Jatana, Tobey and Reiss that he had no lower back pain prior to his July 30, 2020 MVA, medical records reveal that he has previously experienced lower back symptoms. Dr. Reiss detailed that the medical records from November 2019 showed acute symptomatology. Specifically, the medical records from November 2019 reveal that Claimant's symptoms continued for at least 10 days and were somewhat significant. Medical providers assessed Claimant with acute left-sided lower back pain without sciatica. The providers noted that Claimant had a history of previous degenerative disc disorder. Notably, the symptoms were not triggered by any particular event or aggravation. Furthermore,

Claimant confirmed that he suffered prior lumbar symptoms. Claimant reported that he performed construction and had tweaked his back in November of 2019. The symptoms were significant enough that he was concerned that a screw may have been damaged at the L5-S1 level. He thus underwent x-rays. Finally, Claimant acknowledged that the artificial disc replacement he underwent at L5-S1 could contribute to problems at higher levels and cause degeneration.

28. Despite Dr. Jatana's opinion, the medical records, in conjunction with the persuasive opinions of Drs. Janssen and Reiss, reflect that Claimant has failed to demonstrate that lumbar L4-L5 posterior spinal fusion surgery is reasonable, necessary and causally related to his admitted July 30, 2020 industrial injury. Claimant's July 30, 2020 MVA did not aggravate, accelerate or combine with his pre-existing condition to produce the need for the proposed fusion surgery. Accordingly, Claimant's surgical request is denied and dismissed.

CONCLUSIONS OF LAW

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

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

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

4. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need

for medical treatment. *Duncan v. Indus. Claim Appeals Off.,* 107 P.3d 999, 1001 (Colo. App. 2004). The claimant bears the burden of demonstrating a causal connection between his industrial injuries and the need for additional medical treatment. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). The question of whether a particular disability is the result of the natural progression of a pre-existing condition, or the subsequent aggravation or acceleration of that condition, is itself a question of fact. *University Park Care Center v. Indus. Claim Appeals Off.*, 43 P.3d 637 (Colo. App. 2001). Finally, the determination of whether a particular modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

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

6. The MTGs were propounded by the Director pursuant to an express grant of statutory authority. *See* §8-42-101(3.5)(a)(II), C.R.S. It is appropriate for an ALJ to consider the MTGs in determining whether a certain medical treatment is reasonable and necessary for a claimant's condition. *Deets v. Multimedia Audio Visual*, W.C. No. 4-327-591 (ICAO, Mar. 18, 2005); *see Eldi v. Montgomery Ward*, W.C. No. 3-757-021 (ICAO, Oct. 30, 1998) (noting that the MTGs are a reasonable source for identifying diagnostic criteria). The MTGs are regarded as accepted professional standards of care under the Workers' Compensation Act. *Rook v. Indus. Claim Appeals Off.*, 111 P.3d 549 (Colo. App. 2005). In *Hall v. Indus. Claim Appeals Off.*, 74 P.3d 459 (Colo. App. 2003) the court noted that the MTGs shall be used by health care practitioners when furnishing medical treatment under the Workers' Compensation Act. *See* §8-42-101(3)(b), C.R.S. Nevertheless, the MTGs expressly acknowledge that deviation is permissible.

7. The MTGs define a spinal fusion as "a procedure that unites 2 or more vertebral bodies together to restrict motion and removes a degenerative disc to relieve symptoms of coexistent nerve root compression." Rule 17, Exhibit 1, Low Back Pain, Section 8.b.iii. Recommendation 152 of the MTGs delineates the following criteria prior to proceeding with spinal fusion surgery:

- all pain generators are adequately defined and treated;
- all physical medicine and manual therapy interventions are completed;
- imaging studies demonstrate spinal stenosis with instability or disc pathology, requiring decompression;
- spine pathology is limited to 2 levels; and
- psychological evaluation.

Recommendation 153 of the MTGs includes the following diagnostic indications for fusion surgery:

- neural arch defect with associated stenosis or instability;
- spondylolytic spondylolisthesis;
- degenerative spondylolisthesis 4 mm or greater;
- surgically induced segmental instability;
- symptomatic spinal stenosis in the presence of spondylolisthesis (>2 mm)

8. As found, Claimant has failed to demonstrate by a preponderance of the evidence that lumbar L4-L5 posterior spinal fusion surgery as requested by Dr. Jatana is reasonable, necessary and causally related to his admitted July 30, 2020 industrial injury. Initially, Claimant was involved in a work-related MVA on July 30, 2020 and experienced back pain. He underwent conservative treatment in the form of physical therapy and injections, but continued to experience symptoms. Claimant's lumbar MRI revealed mild disc space narrowing and desiccation with a mild symmetric disc bulge and a small superimposed central disc extrusion at L4-L5. There was also mild bilateral facet hypertrophy without significant central canal or foraminal stenosis. Treating physicians Drs. Tobey and Leach did not make any surgical recommendations. However, Dr. Leach ultimately referred Claimant to Dr. Jatana for a surgical consultation.

9. As found, after reviewing Claimant's medical records, Dr. Jatana determined that Claimant had failed nonsurgical treatment and undergone concordant diagnostic L4-L5 epidural steroid injections. He commented that the L4-L5 level had been identified as the pain generator. Dr. Jatana thus recommended a posterior lumbar fusion at L4-L5. Notably, however, Dr. Jatana had no comment regarding the cause of Claimant's current symptoms or treatment since the July 30, 2020 MVA. He remarked that Claimant said he was doing well prior to the MVA without significant pre-existing lower back pain.

10. As found, despite Dr. Jatana's surgical request, the persuasive medical opinions reflect that Claimant has failed to demonstrate that lumbar L4-L5 posterior spinal fusion surgery is reasonable, necessary and causally related to his admitted July 30, 2020 industrial injury. After reviewing relevant medical records, Dr. Janssen assessed Claimant with "nonspecific cervical and lumbar dysfunction without clear-cut evidence of an anatomical condition related to" the July 30, 2020 MVA. He specified that the MVA did not cause the disc desiccation, result in the concern of a syrinx on the MRI, and did not cause the anatomical findings identified as a pain generator for Claimant's underlying condition. Specifically, although Claimant may have had myofascial symptomatology, there was no structural abnormality directly related to the July 30, 2020 MVA. Dr. Janssen determined that "it does not appear that there is any indication for cervical spinal reconstructive surgery as it relates to the accident. It is unknown whether or not the lumbar spine disc (pending discography) is truly related" to the July 30, 2020 MVA.

11. As found, similarly, after conducting an independent medical examination, Dr. Reiss concluded that Claimant's lower back symptoms were not causally related to

his MVA. Initially, Dr. Reiss explained that Claimant's MRI findings were normal for a person of his age, showed some degeneration and there was no nerve contact of significance. Notably, the findings were minor and not related to any specific trauma. Furthermore, December 10, 2020 flexion and extension imaging only showed minor degeneration, no instability and nothing acute. Dr. Reiss explained that none of the preceding findings would account for any lower extremity complaints. He reasoned that Claimant likely suffered myofascial pain that was worsened by deconditioning. A fusion and/or disc replacement was thus highly unlikely to significantly improve his condition. Furthermore, Dr. Reiss concluded that Claimant's request for fusion surgery did not meet the requirements of the MTGs. Notably, no specific pain generator had been sufficiently identified. Dr. Reiss commented that, in the absence of instability and degeneration, a fusion was very unlikely to provide any relief and was no more likely to provide improvement than other conservative care. Finally, Dr. Jatana's proposed posterior fusion surgery at L4-L5 would place additional stress on the previous L5-S1 disc replacement and make Claimant's back more symptomatic.

12. As found, the medical records also reveal that Claimant has suffered from pre-existing back symptoms. Importantly, Claimant underwent a prior lower back surgery in approximately 2002 or about 18 years before his July 30, 2020 work injury. He specifically had an artificial disc replacement at L5-S1. Although Claimant stated to Drs. Jatana, Tobey and Reiss that he had no lower back pain prior to his July 30, 2020 MVA, medical records reveal that he has previously experienced lower back symptoms. Dr. Reiss detailed that the medical records from November 2019 showed acute symptomatology. Specifically, the medical records from November 2019 reveal that Claimant's symptoms continued for at least 10 days and were somewhat significant. Medical providers assessed Claimant with acute left-sided lower back pain without sciatica. The providers noted that Claimant had a history of previous degenerative disc disorder. Notably, the symptoms were not triggered by any particular event or aggravation. Furthermore, Claimant confirmed that he suffered prior lumbar symptoms. Claimant reported that he performed construction and had tweaked his back in November of 2019. The symptoms were significant enough that he was concerned that a screw may have been damaged at the L5-S1 level. He thus underwent x-rays. Finally, Claimant acknowledged that the artificial disc replacement he underwent at L5-S1 could contribute to problems at higher levels and cause degeneration.

13. As found, despite Dr. Jatana's opinion, the medical records, in conjunction with the persuasive opinions of Drs. Janssen and Reiss, reflect that Claimant has failed to demonstrate that lumbar L4-L5 posterior spinal fusion surgery is reasonable, necessary and causally related to his admitted July 30, 2020 industrial injury. Claimant's July 30, 2020 MVA did not aggravate, accelerate or combine with his pre-existing condition to produce the need for the proposed fusion surgery. Accordingly, Claimant's surgical request is denied and dismissed.

ORDER

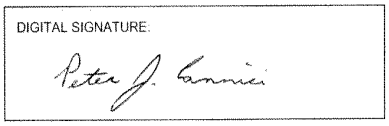
Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's request for a lumbar L4-L5 posterior spinal fusion surgery is denied and dismissed.

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

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

DATED: September 13, 2022.



Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

ISSUES

The issues addressed in this order concerns the calculation of Claimant's average weekly wage (AWW). The specific question answered is:

I. Whether Claimant established, by a preponderance of the evidence, that he is entitled to an increase in his AWW from $460.62/week to $640.00/week.

FINDINGS OF FACT

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

1. Employer operates as a staffing agency that matches workers with employers to fill job openings in the construction trades. Claimant was hired by Employer to work as a construction laborer for [Third party name redacted] in the area of erosion control.

2. Claimant testified that before being hired by [Employer Redacted], he had quit a job in erosion control with another company because he was not getting full time hours. He testified that after he quit his job, he sought work with [Third Party name Redacted] through [Employer redacted] because "Ms. A [Redacted]" assured him that he would get at "least get 40 hours of work and some overtime" with [Third Party name redacted]. Accordingly, Claimant testified that he applied for a position with [Employer redacted], was hired at $16.00/hour and placed with [Third Party Company redacted]. Claimant completed his "Employment Application Form" on January 20, 2022. (Clmt's. Ex. 5, p. 12). He indicated that he was available to start working January 29, 2022. (Resp. Ex. D, p. 7). Claimant agreed that he started working for [Third Party Company redacted] around January 29, 0222.

3. Claimant testified that he suffered a back injury on March 30, 2022, while digging a trench and moving dirt. (*See also*, Clmt's. Ex. 1, p. 2). Following this injury, Claimant completed a "Worker's Claim for Compensation form on March 31, 2022. *Id*. In his claim for compensation, Claimant declared an average weekly wage (AWW) of $720.00. *Id*. Although he was offered modified duty work, Claimant testified that his doctor would not approve the position. Consequently, Claimant testified that he has not worked since the date of his injury.

4. Respondents admitted liability for Claimant's injury as evidenced by a General Admission of Liability (GAL) filed on May 11, 2022. (Clmt's. Ex. 2, p. 4; Resp. Ex. A, p. 1). The May 11, 2022, GAL reflects that Claimant's wages were paid "from DOI (date of injury) through 4/24/2022." *Id*. As Claimant began to lose time from work beginning April 25, 2022, it was necessary for Respondents to calculate his AWW to

insure proper payment of temporary total disability (TTD) benefits.

5. Respondents calculated Claimant's AWW to equal $460.62. (Clmt's. Ex. 2, p. 4; Resp. Ex. A, p. 1). Respondents did not provide a basis for their calculation. Claimant contends that the admitted AWW is incorrect. He maintains that he had a reasonable expectation of getting at least 40 hours of work a week while working for [Third Party Company redacted] based upon his conversation with [Name Redacted, hereinafter Ms. A]. During cross-examination, Claimant suggested that he was not getting his anticipated full 40 hours of work due to weather, i.e. heavy snow/rain affecting the job site and the fact that he had no control over how his supervisor set his working hours.

6. Payroll records admitted into evidence begin with the pay period ending February 6, 2022 and run through the pay period ending April 24, 2022. (Resp. Ex. D, p. 18). As noted, Claimant testified that he has not worked since March 30, 2022. Accordingly, monies paid for the pay period ending April 3, 2022 through the period ending April 24, 2022 reflect the wage continuation referenced in the May 11, 2022 GAL rather than wages for hours worked. Counting the week for the pay period ending February 6, 2022 and including the remaining weeks extending through the period ending March 27, 2022, the last full week of work before Claimant was injured on March 30, 2022, represents a period of eight weeks. Claimant was paid a total of $3,428.00 over this period. *Id.* The payroll records also reflect that during this eight-week period, Claimant only worked a full 40-hour workweek once, i.e. for the pay period ending February 20, 2022. *Id.* Claimant also worked 5.50 hours of overtime for this same pay period. *Id.*

7. Claimant contends that the payroll records admitted into evidence are incorrect and do not accurately reflect the hours he worked. He testified that he worked overtime on at least two occasions whereas the payroll records indicate that he only worked overtime once before his injury. Claimant testified that although he expected he would get 40 hours per week, he did not call Ms. A [Redacted] to complain that his hours were short because he knew the weather was affecting his hours. He suggested that as the weather improved his hours would increase.

8. Ms. A [Redacted] testified as an Account Executive for Employer. She confirmed that Claimant was hired as a construction laborer at $16.00/hr. (*See also*, Resp. Ex. D, p. 12). Ms. A [Redacted] testified that while she anticipated that Claimant could work as many as 40 hours a week for [Third Party Company redacted], she made no promise or guarantee to Claimant that he would get 40 work hours per week plus overtime as he implied. She clarified during cross-examination that she told Claimant that he could work up to 40 hours, weather permitting.

9. Ms. A [Redacted] testified that the hours of [Employer redacted] employees placed with [Third Party Company redacted] vary from week to week. She testified that for the week of March 13, 2022, none of the [Employer redacted]'s employees placed with [Third Party Company redacted] worked a full 40 hours. (Resp.

Ex. D, p. 14). She also testified that out of nine employees placed with [Third Party Company redacted] on March 20, 2022; only four worked a full 40-hour workweek. (Resp. Ex. D, p. 15). For the week ending March 27, 2022, Ms. A [Redacted] testified that three out of sixteen employees placed with [Third Party Company redacted] worked 40 hours. (Resp. Ex. D, p. 16). Finally, the records reflect that Claimant worked 8 hours on March 29, 2022 and 5 hours March 30, 2022. He did not work March 31, 2022, April 1, 2022, or April 2, 2022. No employees placed with [Third Party Company redacted] worked Sunday, April 3, 2022. (Resp. Ex. D, p. 17).[1]

10. Ms. A [Redacted] testified that Employers payroll records cannot be tampered with in the system from which they are produced. She also confirmed that Claimant never called her to inform her that he was not getting his anticipated hours.

11. Ms. A [Redacted] confirmed that Claimant has not worked since March 30, 2022. She confirm that Employer paid Claimant at a rate of $16.00/hour for 40 hours or $640.00 for three weeks after his injury. She no explanation for why Claimant was being paid $640.00 a week for this period.

12. Based upon the evidence presented, the ALJ is not persuaded that Employer lead Claimant to believe that he would get 40 hours of work per week as a construction laborer at [Third Party Company redacted]. In this regard, the ALJ credits the testimony of Ms. A [Redacted] to find that no promises or guarantees of working 40 hours were extended to Claimant. Rather, the ALJ is convinced that Ms. A [Redacted] probably conveyed to Claimant that under [Third Party Company redacted] it was possible that he could work up to 40 hours per week. Nonetheless, the ALJ is convinced that weather probably altered the number of days and hours Claimant was able to work during the late winter and early spring months following his hire on January 22, 2022.[2] In fact, Ms. A [Redacted] seemingly acknowledged as much when she testified that Claimant could work as many as 40 hours per week, "weather permitting."[3]

13. As submitted the March 13, 2022, time sheet contained at Resp. Ex. D, p. 14 supports a finding that weather was likely affecting the entire crew's ability to work during the week of March 7-13, 2022. In fact, no employee worked every day this week, no employee worked 40 hours for the week and no one worked Thursday or Saturday. Moreover, only four of 16 employees worked on Monday and Friday of this week and only eight of 16 employees worked on Tuesday and Wednesday. (Resp. Ex. D, p. 14). While the March 20, 2022 and March 27, 2022 time sheets suggest that there was an improvement in the weather, based on the increased number of days the crew was working and the average number of hours for those employees, Respondents did not submit a time sheet for the week ending February 6, 2022 or

[1] Based upon the time sheets submitted, the ALJ finds to reasonable to conclude that [Third Party Company redacted] is closed on Sundays.
[2] As testified to by Ms. A [Redacted].
[3] Here, the wage records cover a period of typically unsettled weather in Colorado, namely February, March and April.

February 27, 2022. Thus, the number of days and the average number of hours each member of the crew was working is unknown. Nonetheless, it is known that Claimant only worked 18 hours for the week ending February 6, 2022 and 7.50 hours for the week ending February 27, 2022. Based on the information demonstrated by the March 13, 2022 time sheet, the ALJ finds it reasonable to infer that weather was probably affecting the number of hours Claimant was able to work for the weeks ending February 6, 2022 and February 27, 2022. (Resp. Ex. D, p. 18). Because the number of hours Claimant worked for the weeks ending February 6, 2022 and February 27, 2022, are conspicuously below his reported work hours for the balance of the reported period, the ALJ finds these hours to constitute an anomaly in his earnings. Because the earnings from these two weeks do not accurately and fairly represent Claimant's typical earnings, the ALJ finds that it would be manifestly unjust to calculate Claimant's AWW by including these reduced earnings in the overall computation of his AWW. Accordingly, the ALJ elects to exclude these two weeks of earnings, add the remaining earnings in the 8 week period and divide the total by six weeks to arrive at an AWW of $503.33 ($560.00 + $772.00 + $432.00 + $360.00 + $560.00 + $336.00 = $3,020.00 ÷ 6 weeks = $503.33). (Resp. Ex. D, p. 18).

14. Based upon the evidence presented, Claimant has proven that his AWW should be increased from $460.62 to $503.33 as the ALJ finds this figure most closely approximates Claimant's actual wage loss and diminished earning capacity at the time of his March 30, 2022 industrial injury.

CONCLUSIONS OF LAW

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

Generally

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

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

Average Weekly Wage

C. The overall purpose of the average weekly wage (AWW) statute is to arrive at a fair approximation of a claimant's wage loss and diminished earning capacity resulting from the industrial injury. *See Campbell v. IBM Corp.,* 867 P.2d 77 (Colo.App. 1993)[4]; *National Fruit Prod. v. Crespin,* 952 P.2d 1207 (Colo.App. 1997).

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

E. The best evidence of Claimant's actual wage loss and therefore a fair approximation of his diminished earning capacity as of March 30, 2022 comes from the time sheets and wage records admitted into evidence. As found here, careful review of those materials persuades the ALJ that the computation of Claimant's AWW should not include the pay periods ending on February 6, 2022 and February 27, 2022. Here, the evidence presented supports a conclusion that the aforementioned pay periods represent an aberration in Claimant's proven earning capacity, probably due to factors beyond his control, specifically inclement weather and his supervisor's actions regarding the setting of Claimant's work hours. Indeed, the ALJ is convinced that but for the unsettled weather, Claimant likely would have worked the increased hours he testified he felt were coming as the weather improved. Accordingly, the ALJ concludes that it would be unjust to include Claimant's lowered earnings for the pay periods ending February 6, 2022 and February 27, 2022 as they were likely disproportionally affected by the weather at the time. Based upon the evidence presented, the ALJ agrees with Claimant that his AWW should be increased. While the ALJ is not convinced that Claimant is entitled to an increase to $640.00, the evidence supports and increase from $460.62 to $503.33, as this figure represents the fairest approximation of his wage loss and diminished earning capacity at the time of his March 30, 2022 industrial injury.

ORDER

It is therefore ordered that:

1. Claimant has established, by a preponderance of the evidence, that he is entitled to an increase in his AWW from $460.62 to $503.33.

2. Respondents shall pay temporary total disability (TTD) benefits corresponding with an AWW of $503.33 for the time period reflected in the GAL filed May 11, 2022, i.e. from April 25, 2022 and ongoing until such time that the TTD

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

benefits can be terminated in accordance with the provisions of the Colorado Workers' Compensation Act.

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

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

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

DATED: September 13, 2022

/s/ Richard M. Lamphere

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

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that the right hip replacement surgery recommended by Dr. Derek Johnson is causally related to the admitted work injury of March 8, 2022.

STIPULATION

The parties stipulated that the surgery recommended by Dr. Derek Johnson was reasonably necessary, making the sole remaining issue whether the surgery was causally related to the claim.

FINDINGS OF FACT

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

1. Claimant is a 54 year old truck drive for Employer, transporting food products to a local grocery store. He drove an 18 wheeler tractor trailer Class A. The job included manual lifting from floor to knee level up to 100 lbs. and up to 50 lbs. from knee to shoulder as well as pushing and pulling loads of up to 75 lbs. He was required to manually crank landing gear on the trailer, which required bending and twisting, and climbing into and out of the tractor, trailer, and on or off of catwalks, stepping up to 24" above the ground. Driving required use of both legs and fee to brake, accelerate and clutch.

2. Claimant was injured in the course and scope of his employment with Employer when he slipped on ice and fell on his right hip, causing injury to the right hip, on March 8, 2022. Claimant stated that he was in the process of performing his truck inspection, including checking on the pin hook-up of the trailer to make sure that everything was secure, when he slipped on the ice. He stated it was a hard fall directly on his right hip.

3. Claimant credibly testified that he had no problems with his right hip and was able to carry out all the requirements of his job prior to the March 8, 2022 incident. He advised that he had no prior medical care for his right hip, nor did he have any work restrictions that limited his ability to perform his work until March 8, 2022.

4. He stated that he had been a football player in his youth and had to have a knee replacement as early as in his twenties. He also stated that he had the left hip replaced as well, in approximately 2012 or 2013 and the opposite knee replaced in approximately 2015. However, he was not advised by his medical provider he had osteoarthritis of the right hip until he was treated for this work related incident. He recalls specifically contacting the providers to make sure that the CT scan and the MRI scan were provided to Dr. Derek Johnson, his surgeon, and he later discussed his diagnosis.

Dr. Johnson showed him the x-rays and explained that he had a fracture at the subchondral humeral head.

5. He stated that he had worked driving, loading and unloading semi-trucks/trailers for approximately one and one half years for Employer and prior to that, Claimant worked for seven years in the oil fields as a driver. He would be required to lift and move drums full of chemicals to the oil sites. He would also assist with tearing down and setting up the oil rig pads or platforms. All of these jobs in the oil fields were even heavier than the job he was performing for Employer of injury. He credibly conveyed that he was able to perform these jobs without any problems or pain in his right hip or restrictions.

6. On March 8, 2022 Claimant was evaluated in the emergency room at St. Joseph Hospital by Heather Orth, M.D. and Christopher North, PA-C. The history of present illness described Claimant with no significant medical history regarding the right hip prior to having fallen at work just prior to arrival. He described landing on the apex of his right hip. He had immediate pain and inability to bear weight, and no prior fractures of the right hip. They noted moderate diffuse tenderness laterally, with pain in the inguinal region with range of motion and a limping gait. They suspected a stress fracture and ordered a CT scan. The CT did not reveal any fractures or joint malalignment but showed advanced osteoarthritis of the hip, as read by osteopath Chelsea Jeranko. Dr. Jeranko also noted that the collar of the femoral head had osteophytes partially contributing to decrease femoral head/neck junction offset (cam morphology)[1]. Enthesopathy of the greater trochanter and ischial tuberosity indicative of underlying gluteal and hamstring tendinopathy, respectively. Mr. Tipton diagnosed contusion of the right hip. They recommended use of antiinflamatories, ice to the hip area, avoid walking if it caused pain and to use crutches if necessary.

7. Claimant was first seen by Jennifer Voag, PA-C and Gary Childers, M.D. of Aviation and Occupational Medicine (A&OM) on March 10, 2022. They noted that Claimant was a truck driver picking up a load, when he walked back to check on the pin on the trailer and slipped and fell on ice, on his right hip. They noted he had constant pain and a cramping feeling in the hip, with very limited range of motion and that Claimant had difficulty with ambulation or weight bearing on the injured hip, finding tenderness over the right hip joint. They diagnosed a strain and contusion of the right hip. They stated that, based on the examination, history, mechanism of injury, and objective findings on examination, that it was their medical opinion that there was greater than a 51% probability that this was a work-related injury. They ordered an MRA, continued medications, provided crutches and a heating pad, and provided modified duty of sitting only. They noted that objective findings were consistent with history and work related mechanism of injury.

8. Respondents filed a General Admission of Liability on March 23, 2022. Respondents noted that they were admitting to an acute right hip injury and started temporary disability benefits as of March 10, 2022.

9. Claimant was seen again on March 29, 2022 at A&OM. Claimant reported that his hip pain was actually worse with popping and constant pain, including throbbing

[1] Cam morphology is an abnormal morphology of the femoral head-neck junction.

and catching. They referred Claimant to Dr. Johnson, as he had been the physician that had previously seen Claimant for past bilateral total knee replacements and a left hip replacement.

10. On April 14, 2022 Dr. Derek Johnson, of Centura Orthopedics and Spine Meridian/Centura Health, examined Claimant and ordered x-rays, which showed advanced bone-on-bone osteoarthritic changes of the right hip and a subchondral fracture of the femoral head on his right hip.[2] Dr. Johnson specifically stated as follows:

> He has a subchondral femoral head fracture. This likely occurred as result of his fall. He did have pre-existing arthritis which was asymptomatic, but I think this acute femoral head impaction fracture is likely what is causing majorities pain. With the severity of his arthritis and this new acute fracture I think there is [not][3] (sic.) much to offer short of hip replacement that will offer him meaningful long-term relief of his symptoms.

11. On April 15, 2022, Dr. Johnson faxed a request for prior authorization to Respondents' adjuster for a right total hip arthroplasty due to right hip osteoarthritis and fracture of the femoral head.

12. Insurer sent a letter to Dr. Johnson on April 19, 2022 requesting his opinion with regard to Claimant's preexisting conditions, diagnosis and opinions.

13. Dr. Johnson responded on the same day that Claimant had a preexisting condition of osteoarthritis of the right hip, stated that the March 8, 2022 work related injury caused the subchondral femoral head fracture, and that Claimant would not have needed the surgery were it not for the work related injury as Claimant's arthritis was asymptomatic prior to the injury. He further stated that it was more likely than not Claimant would not have required the surgery but for the March 8, 2022 work related injury as Claimant's severe increase in pain was likely the result of his fall and the subsequent fracture.

14. On April 25, 2022, the same adjuster, sent Dr. Johnson a Rule 16 denial of the request for prior authorization for the proposed surgery, with the attached report authored by Timothy S. O'Brien, M.D., based on a medical record review.

15. Dr. O'Brien opined that, based on the review of the records, MRI and CT scans, that Claimant did not actually have a fracture of the femoral head because the reports of the MRI and CT did not express that there was bleeding. He further opined that the Claimant's preexisting osteoarthritis was the cause of Claimant's hip pain, not anything that might have occurred during the March 8, 2022 fall on the right hip. He specifically stated that "[T]he presence of right hip pain after a fall onto an arthritic hip joint is not an indication that new tissue breakage or yielding occurred; rather, it is an expected and predictable manifestation of the underlying condition itself." He further noted that Claimant's fall on the ice did not make him a candidate for right hip replacement as there was no aggravation or acceleration caused by the accident, but that he likely required the hip replacement before the date of injury.

---

[2] This ALJ infers that the x-rays were read by Dr. Johnson based on the statement that it was "electronically signed by Derek Ryan Johnson, MD at 4/14/2022 3:02 PM."

[3] Inferred based on the remaining portions of the report and the request for prior authorization recommending the surgery.

16. On April 26, 2022 Respondents sent A&OM a copy of Dr. O'Brien's report requesting a medical opinion in the matter following review.

17. Claimant was evaluated by Dr. Michael Ladwig, of A&OM, on May 9, 2022 noting that Insurer denied Claimant's right hip replacement and Lidoderm patches. Dr. Ladwig continued Claimant on sitting duty only and kept Claimant not at maximum medical improvement (MMI). The records noted that Claimant's symptoms were unchanged and Claimant was tender at the hip and groin. Claimant specifically indicated to his provider that he did not have the current severe symptoms or need for crutches prior to the March 8, 2022 fall.

18. On May 16, 2022 Dr. Ladwig reviewed Dr. O'Brien's medical record review and opined that Claimant continued to require an unknown amount of treatment, could not anticipate when Claimant would return to full duty or when Claimant would reach MMI for the March 8, 2022 work injury.

19. On June 1, 2022 Dr. Childers and Amelia Carmosino, PA, continued Claimant on the same sedentary restrictions and stated Claimant continued not to be at MMI. On exam, Claimant continued to have tenderness at the lateral hip and groin area. There was a notation that Claimant continued to ambulate with crutches and was having back spasms secondary to limping. The records noted that Claimant was planning on proceeding with surgery despite denial as Claimant "can't wait anymore." There was a notation that the treatment plans was to proceed with the right hip replacement surgery with Dr. Johnson, scheduled for July 5, 2022 and a follow up was scheduled with Dr. Ladwig for July 11, 2022.

20. Claimant was evaluated by Robert Cox, Dr. Johnson's physician assistant, on June 7, 2022. Claimant continuing to have severe, unremitting right hip pain that was not responding to over the counter medications. He prescribed a narcotic medication at that time.

21. The July 11, 2022 note from Dr. Ladwig stated that the surgery was cancelled due to Claimant's A1C levels, noting it was rescheduled for August 15, 2022. Claimant's restrictions did not change from sedentary duty.

22. Dr. Ladwig continued to note, on August 1, 2022, that Claimant's objective findings were consistent with the history and work related mechanism of the injury. This is the last medical report in evidence from A&OM.

23. Claimant testified that the surgery proceeded on August 15, 2022 but he continued to have some right hip pain.

24. Dr. O'Brien supplemented his medical record review on August 22, 2022, following receipt of further records. The reviewed records were not submitted into evidence. Dr. O'Brien's summary of those records will not be adopted by this ALJ. Dr. O'Brien's opinion did not change. He specifically opined that Claimant "did not sustain a work-related injury on" March 8, 2022. It is clear that Dr. O'Brien did not believe Claimant to have been asymptomatic as he stated that "the likelihood that [Claimant] had no right hip pain prior to his work-related incident on March 8, 2022, is virtually 0%."

25. As found, Dr. O'Brien is not credible in this matter, stating there was likely a zero percent probability that Claimant was asymptomatic before the fall on March 8,

2022. From the totality of the evidence, Claimant is found credible in this matter. Claimant performed a heavy duty job which required multiple activities including driving an 18 wheeler, delivering, loading and unloading product for a local grocery store, not to mention the heavy duty job he had prior to the one with Employer of injury. Claimant was limited to sedentary duty and use of crutches or a cane to ambulate following the work related injury. This ALJ observed Claimant in the courtroom utilizing cane for ambulation.

26. Drs. Ladwig, Childers, PA-Cs Voag and Carmosino as well as Dr. Johnson are found credible and persuasive, in that they believed Claimant was asymptomatic prior to the work injury and sustained a work related injury on March 8, 2022, causing a subchondral femoral head fracture, and aggravating the underlying osteoarthritis of the right hip. The contrary opinions of Dr. O'Brien's medical record review reports are not found credible.

CONCLUSIONS OF LAW

A. Generally

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

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

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial*

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

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

B. Relatedness of Medical Benefits

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

This is an admitted claim. The issue of whether Claimant was injured in the course and scope of his employment is not an issue in this matter. The principal matter here is whether Claimant's need for the right hip arthroplasty is causally related to the admitted March 8, 2022 work injury or the natural progression of the Claimant's underlying preexisting osteoarthritis. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with "a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.* If a direct causal

relationship exists between the mechanism of injury and resultant disability, the injury is compensable if it caused a preexisting condition to become disabling. *Duncan v. Industrial Claim Apps. Office*, 107 P.3d 999 (Colo. App. 2004). However, there must be some affirmative causal connection beyond a mere assumption that the asserted mechanism of injury was sufficient to have caused an aggravation. *Brown v. Industrial Commission*, 447 P.2d 694 (Colo. 1968). It is not sufficient to show that the asserted mechanism could have caused an aggravation, but rather Claimant must show that it is more likely than not that the mechanism of injury did, in fact, cause an aggravation. *Id*. Further, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

Pain is a typical symptom from the aggravation of a pre-existing condition, and if the pain triggers the claimant's need for medical treatment, the claimant has suffered a compensable injury. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Dietrich v. Estes Express Lines*, W.C. No. 4-921-616-03 (September 9, 2016). But the mere fact that a claimant experiences symptoms at work does not necessarily mean the employment aggravated or accelerated the pre-existing condition. *Finn v. Industrial Commission*, 437 P.2d 542 (Colo. 1968); *Cotts v. Exempla*, *supra.* Rather, the ALJ must determine whether the need for treatment was the proximate result of an industrial aggravation or is merely the direct and natural consequence of the pre-existing condition. *F.R. Orr Const. v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Carlson v. Joslins Dry Goods Company*, W.C. No. 4-177-843 (March 31, 2000).

As found, Claimant has shown that it is more likely than not that the March 8, 2022 slip on ice and fall on his right hip was the mechanism of injury and the proximate cause of Claimant's need for medical care. Claimant credibly described that he did not have any pain prior to his fall on ice. He specifically stated that he was working his full time job as a driver of an 18 wheeler tractor truck and trailer, including duties of loading and unloading of the merchandise he was hauling, lifting upwards of 75 lbs. at a time, and at no time had limitations or restrictions prior to the accident. Further, for several years before he started his employment with the Employer of injury sometime in 2020, he was working an even heavier job for the oil industry without limitations moving large barrels of chemicals. Claimant was conducting the inspection of his tractor/trailer, making sure the pin was in place and the rig was safe to drive, when he slipped on the ice and fell directly on his right hip, hard enough to cause a fracture of the subchondral femoral head. Claimant is found credible and persuasive.

Further, as found, Drs. Ladwig, Childers, PA-Cs. Carmosino and Voag and especially Dr. Johnson are found more persuasive than Dr. O'Brien. Specifically, Dr. Ladwig and Childers continued to care for Claimant and, despite having reviewed Dr. O'Brien's IME report, continued to state that, based on history, mechanism of injury, and objective findings on examination, it was more likely than not that this was a work-related injury and Claimant was not at MMI. It is inferred from these statements that these physicians and providers themselves found Claimant credible as well. Even Dr. O'Brien felt that the hip replacement surgery was reasonably necessary in light of the Claimant's underlying osteoarthritis. Claimant proceeded with the right hip arthroplasty by Dr. Johnson on August 15, 2022. Dr. Johnson advised that the total hip replacement surgery

was Claimant's best chance for recovery considering that Claimant sustained a fracture of the subchondral femoral head when he fell, impacting his right hip. This caused the underlying asymptomatic osteoarthritis to become symptomatic, requiring further medical care. The recommended treatment by Dr. Johnson is related and proximately cause by the work injury of March 8, 2022. Claimant has proven by a preponderance of the evidence that he is entitled to medical care as the subchondral femoral head fracture caused an aggravation of the osteoarthritis in his right hip and is entitled to medical care to cure and relieve him of the effects of his injuries.

ORDER

IT IS THEREFORE ORDERED:

1. Respondents shall cover all medical treatment from the authorized providers for the reasonably necessary, and the causally related aggravation of the underlying preexisting right hip osteoarthritis, needed to cure and relieve the effects of Claimant's admitted March 8, 2022 injuries, including but not limited to the right hip arthroplasty performed by Dr. Johnson, subject to the Division of Workers Compensation Medical Fee Schedule.

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

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

DATED this 14th day of September, 2022.

Digital Signature

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

ISSUES

- Whether Respondents have proven by a preponderance of the evidence that Claimant's injury resulted from Claimant's willful failure to obey a reasonable rule adopted by Employer for the safety of the employee?

FINDINGS OF FACT

1. Claimant sustained admitted injuries in a motor vehicle accident that occurred in the course and scope of Claimant's employment with Employer on March 2, 2022.

2. Respondents presented the testimony of JL[Redacted, owner of Employer, at hearing. Mr. JL[Redacted] testified Employer had safety rules regarding the driving of company vehicles. Mr. JL[Redacted] testified this safety rule required that a seatbelt must be worn at all times the vehicle is moving. The rule further required that only employees of Employer are allowed in the vehicle and that there be no texting and driving. Claimant received and signed a copy of these policies on his date of hire, August 1, 2021.

3. Following the accident, Colorado State Patrol Officer J. Carbajal responded to the scene of the crash and issued a traffic accident report. In the accident report, Officer Carbajal wrote that Claimant was driving westbound on Interstate 70 and attempted to pass a semi-truck pulling a trailer. Claimant's vehicle lost control, drove off of the left side of the road, drove back onto the road and overcorrected. The report states that Claimant's vehicle then began to rotate, drove off of the left side of the road, struck a delineator post and overturned two times in the median, ejecting Claimant. Officer Carbajal wrote that the vehicle driven by Claimant was a GMC 2500. The report documented the license plate and vehicle identification number. Officer Carbajal recorded that the road at the scene of the crash was straight, dry and level. The weather was clear at the time of the crash. Officer Carbajal indicated that there were no observed vehicle defects. Under the section entitled "driver actions" Officer Carbajal wrote that careless driving and a lane violation were involved.

4. Grand Valley Fire Protection District responded to the scene of the crash. Claimant was located supine on the ground in the median. Claimant told the responding personnel that he was driving at highway speeds when he lost control of the vehicle and it rolled multiple times. Claimant stated that he was ejected from the vehicle and had loss of consciousness for an unknown amount of time. Claimant complained of pain in the midline spine in the mid-thoracic area where there was a visible deformity. No obvious trauma to the bilateral shoulders or chest was noted. There was a laceration present on the left elbow. Motor function and sensation were normal in both the right and left shoulders. Claimant was transported to Grand River Hospital.

5. Claimant was evaluated at Grand River Hospital on the date of the crash by Dr. Matthew Skwiot. Dr. Skwiot recorded that examination of the chest was normal with normal palpation of the entire chest wall. There was tenderness in the lumbar and thoracic spine. Claimant displayed full range of motion in his extremities. A computerd tomography ("CT") scan of the cervical spine showed swelling within the right sternocleidomastoid muscle due to possible strain or sprain. A CT scan of the chest, abdomen and pelvis showed spinal fractures in the thoracic and lumbar spine from T11 down to L3. This image also revealed bilateral posterior fifth rib fractures and pulmonary contusions in the posterior aspects of the upper and lower lobes of both lungs. No soft tissue traumatic injuries were seen within the abdomen or pelvis. Dr. Skwiot ordered Claimant to be transferred to St. Mary's Hospital.

6. Claimant was flown to St. Mary's Hospital by Care Flight of the Rockies. Their report reads that the Claimant was traveling on west bound on I-70 when he went off the highway and into the median. It was noted that Claimant was not restrained and was subsequently ejected from the vehicle. The records further note that Claimant does not fully recall the event.

7. St. Mary's Hospital treated Claimant beginning on March 2, 2022. The medical records from St. Mary's Hospital contain contradictory reports regarding Claimant's seatbelt usage.

8. Examination of Claimant indicated he denied chest and abdominal tenderness. Claimant did complain of thoracic back pain. The records further note Claimant had a lacunar laceration to the left posterior elbow but no other noted injuries to the upper extremities. A CT scan of the head was negative for intracranial injury.

9. Claimant was diagnosed with multiple unstable spinal fractures, bilateral posterior fifth rib fractures, bilateral pulmonary contusions and a small laceration to the left elbow. Claimant was subsequently evaluated by Dr. Basheal Agrawal on March 3, 2022. Dr. Agrawal noted that Claimant was involved in a high-speed motor vehicle accident while unbelted with ejection from the vehicle. Claimant underwent surgery including T8-L2 instrumented segmental posterolateral fusion and open reduction of kyphotic spinal deformity associated with spinal fracture on March 4, 2022. Claimant was eventually discharged on March 9, 2022 with restrictions of no lifting of greater than 10 pounds and minimizing bending and twisting and no driving while on narcotic mediations.

10. On March 24, 2022, Insurer filed a general admission of liability ("GAL") admitting to medical benefits and TTD from March 3, 2022 and ongoing. The GAL reduced claimant's disability benefits by 50% pursuant to a safety rule violation for no use of the seatbelt pursuant to Section 8-42-112(1)(b)..

11. Claimant was evaluated by Dr. Joel Dean on April 19, 2022. Claimant reported to Dr. Dean that some of his medical notes have been wrong and reported that his freight truck did not swerve out of control, but rather his vehicle started to fishtail. Claimant reported Dr. Dean that he was ejected from the vehicle and that he landed

hard on his back in some mud. Claimant reported that he snapped his head back hard but did not think that he hit his head.

12. Claimant reported to Dr. Dean that when he wakes up in the morning he has double vision that is horizontal and vertical and gradually resolves into blurred vision. Claimant reported having trouble staying organized and having trouble with words and thinking of things. Dr. Dean noted on examination that strength testing of the left and right shoulders did not reveal any recorded deficits. Claimant complained of continued significant low back and buttock pain. Dr. Dean diagnosed Claimant with a concussion, post-traumatic stress disorder ("PTSD"), and syndrome of inappropriate antiduretic hormone secretion (SIADH). Dr. Dean recommended an MRI scan of the brain and serum and urine studies.

13. On April 25, 2022 Claimant was evaluated by Isa Wright, Ph.D.-c. Ms. Wright noted Claimant alleged that he was ejected from the vehicle and landed on his back after being thrown approximately 30-40 feet in the air. Ms. Wright recommended a neuropsychological evaluation and completed a request for authorization.

14. Adam Michener of Delta V Engineering conducted an investigation and issued a report on June 29, 2022. Mr. Michener indicated in his report the he reviewed materials including the State of Colorado traffic accident report, photographs, Claimant's answers to interrogatories, invoices related to the GMC Sierra pickup Claimant was driving along with GMC specifications for the vehicle. Mr. Michener stated in his report that the accident report recorded that Claimant failed to use the available shoulder and lap belt and was ejected through the side window of the vehicle. Mr. Michener noted that two new tires were put on the vehicle in January of 2022. Mr. Michener noted that there were no indications in the repair records for the vehicle that would explain any alleged fishtailing as alleged by Claimant.

15. Mr. Michener examined the GMC pickup on March 29, 2022. Mr. Michener noted that the vehicle had dents, scratches and other damages consistent with an off-pavement rollover. He noted that all four tires were in good condition with the exception of the front right tire which was deflated and off of the rim as a result of the rollover. Mr. Michener examined the suspension, steering and brake components which were all still attached and Mr. Michener noted that they appeared normal without evidence of any pre-rollover issues.

16. Mr. Michener additionally examined the seatbelt in the vehicle. Mr. Michener report that the driver's side seatbelt was found in the stowed position and did not show any evidence of loading or usage. Mr. Michener reported the seatbelt correctly spooled out and locked when rapidly pulled as intended and the seat belt's latch plate correctly latched into the buckle and would not release unless the buckle's button was depressed. Mr. Michener reported that the fact that Claimant was ejected, the fact that the seatbelt functioned properly, and the lack of any evidence of usage were all evidence that Claimant was not wearing his seatbelt at the time of the rollover.

17. Mr. Michener also downloaded and evaluated data from the GMC pickup's airbag module. There was one non-deployment event which was recorded on the module. During this event, the driver's seatbelt for the collision was reported as "unbuckled." Mr. Michener remarked that it could not be determined whether the recorded event happened during the subject rollover accident or a different incident from January of 2022 noted by claimant in discovery. Mr. Michener noted in his report that to the extent that the recorded event was from the subject rollover it was evidence that Claimant was not wearing his seat belt. Mr. Michener further noted that to the extent that the recorded event was from the prior incident, this would show that Claimant did not always wear his seatbelt as he alleged.

18. Mr. Michener opined that there was no evidence that the roadway conditions or the state of the vehicle would have caused the vehicle to lose control. Mr. Michener opined that the GMC did not have issues that would lead to the rollover and that the driver's seatbelt of the GMC was intact and functioning properly. Mr. Michener further opined that the driver's seatbelt of the GMC showed no signs of usage during the subject rollover and that Claimant was not wearing his seatbelt which resulted in his ejection from the vehicle.

19. Respondents entered into evidence a copy of Employer's safety policies that was signed by Claimant on August 1, 2021. Mr. JL[Redacted] testified that he could not recall Claimant expressing any confusion regarding employer's seatbelt rule. Mr. JL[Redacted] testified that prior to the March 2, 2022 crash, there was no indication that Claimant was not wearing his seatbelt while driving vehicles for Employer. Mr. JL[Redacted] testified that prior to the March 2, 2022 crash Claimant was not disciplined by Employer for failing to wear a seat belt.

20. Mr. JL[Redacted] testified that prior to March 2, 2022, Claimant drove the subject GMC pickup on a regular basis. Mr. JL[Redacted] testified that prior to March 2, 2022, Claimant never alleged to him that the seatbelt in the vehicle was broken, malfunctioning or not in working order. Mr. JL[Redacted] testified that Claimant appraised employer in late January or early February of 2022 that the tires were starting to wear down and Employer had the tires on the vehicle replaced the next day. Mr. JL[Redacted] testified he did not receive any other complaints concerning the vehicle from Claimant.

21. On cross-examination, Mr. JL[Redacted] testified that Claimant rode in the subject vehicle with him once with Mr. JL[Redacted] driving and he never observed Claimant not wearing his seat belt. Mr. JL[Redacted] estified that Claimant was the primary driver of the vehicle but that there could have been other operators who used the vehicle.

22. Mr. Michener testified at hearing consistent with his report. Mr. Michener was recognized as an expert witness in mechanical, automotive and forensic engineering as well as accident reconstruction and investigation. Mr. Michener testified that he examined the vehicle involved in the collision which was confirmed through the vehicle identification number. Mr. Michener testified that the state patrol officer who responded to the crash indicated in his report that Claimant was not seat belted.

23. Mr. Michener testified that his examination of the driver's seatbelt of the GMC pickup revealed no mechanical issues or defects. Mr. Michener testified his examination included testing of the locking mechanism of the seatbelt which locked correctly and firmly and would not release. Mr. Michener testified that he believed that he would have been able to detect any defect with the seat belt. Mr. Michener testified that seat belts are designed to stay locked and restrain passengers in high speed rollover crashes like the one that occurred in this case. Mr. Michener testified that it was not probable from an engineering perspective that the seatbelt was properly worn by Claimant but came unbuckled due to a mechanical defect or other issue during the crash. Mr. Michener testified that he believed that the seatbelt in the GMC pickup would have restrained claimant if he had worn it and that seat belts are designed not to come unlatched due to unintentional or incidental contact.

24. Mr. Michener testified that seat belts have plastic in areas like the d-ring and latch plate where loading marks can form. Mr. Michener testified these marks can form in the seatbelt webbing as well. Mr. Michener explained in his testimony that loading marks are areas where friction and heat have deformed, melted or discolored the material due to the body forces applied to the materials by a person restrained in the seatbelt during a crash and can indicate that a seatbelt was used during a crash. Mr. Michener testified that he examined the driver's seatbelt for loading marks and that there were none. Mr. Michener testified that given the speed of crash he would have expected to find at least some subtle loading marks had Claimant been belted.

25. Mr. Michener testified on cross-examination that load marks can wear off if the vehicle is used repeatedly after an accident due to usage of the seatbelt. Mr. Michener testified that he would not have expected to find loading marks to the seat belts on the previous accidents with the vehicle, but would have expected them in this matter because the vehicle had not been driven since the crash.

26. Mr. Michener testified that the purpose of a seatbelt is the keep the passenger in the seat and decrease the forces applied to the person during a crash. Mr. Michener further testified that in the event of a high speed rollover crash it is safer to be seat belted due to the risk of being ejected from the vehicle. Mr. Michener testified that the vehicle provides integrity that will help prevent injury. By contrast when a person is ejected from the vehicle, there are additional risks, including those of being projected up into the air, increasing the velocity of the person that falls down to the ground. Mr. Michener explained that in a rollover, the vehicle has rotational motion and velocity which is applied to a person when ejected, which Mr. Michener compared to a trebuchet or letting go of a spinning merry-go-round. Mr. Michener testified the forces applied to the person in this scenario are greater compared to when restrained in the vehicle. Mr. Michener testified this is because the person restrained in a vehicle in a rollover loses speed over time and gradually comes to a rest as opposed to an ejection where the individual eventually contacts an immovable object such as the ground.

27. Mr. Michener testified that it was his conclusion that claimant was ejected from the vehicle during the rollover crash due to his failure to wear his seatbelt and that it was unlikely that he would have been ejected if he had been wearing his seat belt.

Mr. Michener testified on re-direct examination that in instances where there is extreme crush to the passenger compartment, that may be a case where someone has less injury risk being ejected outside of the vehicle. Mr. Michener testified that there was nothing revealed by his investigation that would suggest that the crash at issue was an exception to the general rule that it is safer to be inside the vehicle and belted. Mr. Michener testified he evaluated the interior of the cab of the vehicle which remained intact following the accident.

28. Mr. Michener testified that he did not do any calculations as to how Claimant was affected by not wearing his seatbelt and had no opinion as to whether Claimant was further injured as a result of not wearing his seat belt.

29. Claimant testified at hearing in this matter regarding the prior incident in the GMC pickup in February of 2022 when the vehicle veered into the median. Claimant attributed this to bald tires on the vehicle. Claimant testified that the tires were changed on the vehicle after this incident.

30. Claimant testified that on the day of the accident, he was working a job in Glenwood Springs and got in his truck to go home. Claimant testified when he got in the vehicle, he plugged in his phone, put on his seatbelt and looked at the sky before driving the vehicle. Claimant testified he was driving on I-70 in the slow lane when he went to pass a semi-tractor and went off the road. Claimant testified he remembered being thrown from the vehicle after rolling twice.

31. Claimant testified that he remembered falling to the ground flat on his back. Claimant testified that following the motor vehicle accident, he had bruising on the upper left side of and lower right side of his sternum as well as his shoulder.

32. On cross-examination Claimant testified that he always wears his seatbelt as a driver or passenger in a vehicle. Claimant testified that he wears his seatbelt as a matter of habit because that is the law. Claimant also acknowledged that on March 2, 2022 he knew that it was unsafe not to wear a seat belt. Claimant testified that it was a matter of common sense that one should wear their seatbelt for safety purposes. Claimant testified that he does not forget or neglect to put on his seat belt.

33. Claimant acknowledged that Employer had a written safety rule that required employees to wear a seatbelt when the vehicle was moving.

34.The ALJ credits the testimony of Mr. JL[Redacted] and finds that Employer had a safety rule in place which required that Employee's wear their seatbelt when operating a motor vehicle owned by Employer. The ALJ credits the testimony of Mr. JL[Redacted] and finds that this safety rule was in place for the safety of the employee.

35. The ALJ credits the testimony of Mr. Michener and finds that Respondents have proven that it is more probable than not that Claimant was not wearing his seatbelt at the time of the motor vehicle accident on March 2, 2022. Claimant's testimony that he was wearing his seatbelt at the time of the accident is found to be not credible with regard to this issue.

36. The ALJ finds that Respondents have failed to prove that it is more likely than not that Claimant's injuries resulted from his failure to wear the seat belt. Notably, Mr. Michener offered no opinion as to how the failure of Claimant to wear his seatbelt. Additionally, no credible medical evidence was presented at hearing that would establish which of Claimant's injuries, if any, would have been prevented by his use of the seatbelt on March 2, 2022. The medical records in this case are devoid of any credible indication as to how Claimant's injuries from the motor vehicle accident were the result from Claimant's failure to wear his seatbelt.

37. While it is true, generally, that seatbelts may prevent injuries in the event of a motor vehicle accident, there is insufficient evidence presented at hearing that Claimant's injuries in this case were the result of his failure to wear a seatbelt and as opposed to injuries Claimant would have received regardless of his seatbelt use. Moreover, while Mr. Michener testified that the purpose of a seatbelt is to keep the passenger in the seat and decrease the forces applied to the person during a crash, Mr. Michener provided no opinion as to how this general rule would apply in this case. Additionally, there is a lack of credible medical evidence in the medical records that would establish that Claimant's failure to wear his seatbelt on March 2, 2022 resulted in any of his injuries that arose out of the motor vehicle accident.

38. Notably, Section 8-42-112(1)(b), C.R.S., relied on by Respondents to reduce Claimant's temporary disability benefits by 50%, requires that Respondents demonstrate that Claimant's "injury results from the employee's willful failure to obey any reasonable safety rule adopted by the employer for the safety of the employee." This requires Respondents to prove that Claimant not only willfully violated a safety rule, but that the injury resulted from the willful violation. In this case, there is insufficient evidence presented that demonstrates that Claimant's injuries resulted from the safety rule violation, and therefore, Respondents have failed to meet their burden of proof to establish that Claimant's compensation should be reduced by fifty percent (50%) for an injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2021. However, in cases in which an employer alleges a safety rule violation under Section 8-42-112(1)(b), the burden of proof rests with respondents to establish that claimant willfully violated a reasonable safety rule established by the employer. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. Respondents argue that Claimant's injury resulted from a willful violation of a safety rule. Section 8-42-112(1)(b), C.R.S. permits imposition of a fifty percent reduction in compensation in cases "[w]here injury results from the employee's willful failure to obey any reasonable rule adopted by the employer for the safety of the employee." The term "willful" connotes deliberate intent, and mere carelessness, negligence, forgetfulness, remissness or oversight does not satisfy the statutory standard. *Bennett Properties Co. v. Industrial Commission*, 165 Colo. 135, 437 P.2d 548 (1968).

4. The respondents bear the burden of proof to establish that the claimant's conduct was willful. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office*, 907 P.2d 715 (Colo. App. 1995). The question of whether the respondent carried the burden of proof was one of fact for determination by the ALJ. *City of Las Animas v. Maupin*, 804 P.2d 285 (Colo. App. 1990). The claimant's conduct is "willful" if he intentionally does the forbidden act, and it is not necessary for the respondent to prove that the claimant had the rule "in mind" and determined to break it. *Bennett Properties Co. v. Industrial Commission, supra; see also, Sayers v. American Janitorial Service, Inc.*, 162 Colo. 292, 425 P.2d 693 (1967) (willful misconduct may be established by showing a conscious indifference to the perpetration of a wrong, or a reckless disregard of the employee's duty to his employer). Moreover, there is no requirement that the respondent produce direct evidence of the claimant's state of mind. To the contrary, willful conduct may be inferred from circumstantial evidence including the frequency of warnings, the obviousness of the danger, and the extent to which it may be said that the claimant's actions were the result of deliberate conduct rather than carelessness or casual negligence. *Bennett Properties Co. v. Industrial Commission, supra; Industrial Commission v. Golden Cycle Corp.*, 126 Colo. 68, 246 P.2d 902 (1952). Indeed, it is a rare case where the claimant admits that her conduct was the product of a willful violation of the employer's rule.

5. As found, the testimony of Mr. Michener is found to be credible and persuasive that Claimant was not wearing his seatbelt at the time of the injury. As found, Employer established that the safety rule that existed which required employee's to wear a seatbelt when operating a motor vehicle and that safety rule was put into place for the safety of the employee.

6. As found, Respondents have failed to establish that Claimant's injuries following the motor vehicle accident resulted from Claimant's failure to wear his seatbelt. As found, Mr. Michener testified he had no opinion with regard to whether Claimant's injuries were furthered by not wearing his seatbelt. As found, there is insufficient credible evidence in the medical records which would provide credible evidence as to how Claimant's failure to wear his seatbelt resulted in injuries from the motor vehicle accident.

7. Because Respondents have failed to establish that Claimant's injury resulted from a willful violation of a safety rule established by Employer for the safety of employees, Respondents request to reduce Claimant's compensation for his injury by 50% pursuant to Section 8-42-112(1)(b) is denied and dismissed.

ORDER

It is therefore ordered that:

1. Respondents are not allowed a 50% reduction of non-medical benefits pursuant to Section 8-42-112(1)(b).

2. Respondents shall pay Claimant temporary disability benefits without a reduction of benefits.

3. Respondents shall pay statutory interest on all benefits not paid when due.

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

DATED: September 14, 2022

Keith E. Mottram

Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

I. Whether Respondent proved by a preponderance of the evidence Claimant did not sustain a compensable industrial injury, entitling Respondent to withdraw its admissions of liability.

II. In the alternative, whether Respondent proved by a preponderance of the evidence it is permitted to withdraw its admission for Temporary Total Disability (TTD) benefits for the periods of October 14, 2021 through November 1, 2021 and January 26, 2022 through February 22, 2022.

III. In the alternative, whether Claimant proved by a preponderance of the evidence that she is entitled to TTD benefits from March 1, 2022 through April 24, 2022?

STIPULATIONS

The parties stipulated to the following at hearing:

1. The admission of Respondent's Exhibit C is limited to: a) 5th Floor Admin Door 15:38:38 – 15:38:49; and b) 5th Floor Main Hall looking south 15:38:48 – 15:38:53. Additionally, Respondent's Exhibit C is admitted with the understanding that the area where Claimant's injury occurred, i.e. Claimant's desk, is out of view from any security camera and, therefore, not caught on camera.

2. Employer could not accommodate Claimant's work restrictions as of March 1, 2022, as such Claimant did not return to work for the Employer from March 1, 2022, through April 24, 2022.

3. Claimant was overpaid mileage in the amount of $2.82.

4. Respondent is not alleging Claimant committed fraud.

FINDINGS OF FACT

1. Claimant is 61 years of age. Claimant began working for Employer on July 6, 2021 as a screening verification analyst administrator.

2. This matter involves a September 2, 2021 work incident that occurred at approximately 3:05 p.m.

3. On September 2, 2021, Claimant was working at her desk in her cubicle when a security guard, J[Redacted] (last name unknown), came to chat with her. Claimant testified at hearing that she did not have a romantic relationship with J[Redacted], but interacted with him in the same way she interacted with other co-workers. Claimant testified that, on occasion, J[Redacted] would come to her cubicle to chat about different things unrelated to work. She testified that J[Redacted] occasionally made flirtatious comments to her and that she felt some of these comments crossed the line into sexual harassment. She testified that, on September 2, 2021, J[Redacted] was not flirtatious with her.

4. Claimant credibly testified at hearing. Claimant testified that when J[Redacted] approached her cubicle she told him that she was near the end of her shift and needed to finish her work. Claimant testified J[Redacted] proceeded to ask her questions about who was working at the switchboard the next day, which she found odd because she did not work the switchboard. Claimant testified she told J[Redacted] she did not know and that J[Redacted] then proceeded to talk about the Denver Broncos. Claimant testified she again told J[Redacted] that she needed to finish her work. She testified that J[Redacted] proceeded to show her a casing from his gun and said he would shoot her to which she replied, "You are not the only person with a gun. And that's when he became more angrier. I continued to work and that's when he hit me." (Hrg. Audio 2:23:24-2:23:39). Claimant testified that J[Redacted] then struck her in the back of her left shoulder and left her cubicle.

5. Claimant is seen on security video following the work incident using her left arm to open doors at approximately 3:38 p.m. without any apparent difficulty or obvious signs of pain. Claimant reported the incident to Employer's human resources department.

6. Claimant presented to the Aurora Police Department on September 9, 2021 to file a report regarding the September 2, 2021 incident. Officer Jacob Williams took the report from Claimant, investigated the matter, and wrote a report regarding his investigation. According to OW[Redacted]' report, Claimant reported to him that "J[Redacted] would come to her desk and flirt with [her] while she was working. When [she] asked J[Redacted] to leave her alone on Thursday, September 2, 2021, J[Redacted] punched her on the left shoulder with a closed fist." His report further indicates that Claimant reported when J[Redacted] hit her it hurt but it did not leave a bruise or mark. (R. Ex. B, p. 30).

7. OW[Redacted] testified at hearing on behalf of Respondent. OW[Redacted] testified that his report was an accurate summary of Claimant's statements to him and his investigation of the matter. He testified that he interviewed Claimant face-to-face on September 9, 2021. He stated that he did not observe any obvious signs of injury to Claimant. He testified that he also interviewed J[Redacted], the security guard, face-to-face. He testified that, based on his observations, J[Redacted] appeared surprised to hear of the allegations against him.

8. Employer completed a First Report of Injury on September 10, 2021 documenting, "[Employee] stated that the guard at the front desk punched her arm which caused her

pain and told the Deputy Director that she also has pain in the neck and shoulder pain as of 9/8/21. Also has stress and anxiety with this person". (Cl. Ex. 1, p. 1).

9. Claimant presented to Tom Chau, PA-C under the supervision of Matthew Lugliani, M.D. on September 10, 2021. Claimant reported that she had been struck by a security guard at work on both August 26, 2021 and September 2, 2021. Claimant reported that the security guard struck her in the back of her left shoulder on both occasions. Claimant reported that the second incident resulted in pain in the back of her left shoulder as well as up the left trapezius and into the left side of her neck. Claimant also complained of pain down into her left hand. On physical examination, PA Chau noted pain and tenderness to palpation of the left shoulder with mild tightness and spasms. He did not note any swelling, discoloration, or bruising. PA Chau diagnosed Claimant with left shoulder pain, prescribed Claimant pain medication and referred her for physical therapy. He removed Claimant from work from September 10, 2021 to September 20, 2021.

10. Claimant underwent five occupational therapy sessions from September 13, 2021 through March 18, 2022.

11. On September 20, 2021 Claimant saw David Rojas, M.D. with complaints of continued left shoulder pain and stiffness, worsening radicular signs in the left arm and hand, as well as depression and anxiety. On examination, Dr. Rojas noted tenderness in the posterior left shoulder extending into the trapezius with mild tightness and spasms and limited range of motion. There was also decreased grip strength in the left hand. Dr. Rojas assessed Claimant with left shoulder and upper extremity pain after assault and posttraumatic stress disorder (PTSD). He referred Claimant for a psychological evaluation cervical and shoulder MRIs, a pain management consultation, and an EMG. Dr. Rojas continued Claimant's work restrictions to September 30, 2021.

12. On September 24, 2021 Claimant e-mailed Employer, stating,

> Since I have been an employee with the [Employer], I have suffered from continued unwanted sexual advances and two assaults from Security Guard, J[Redacted], (last name unknown). J[Redacted] continued to present himself to me in an unprofessional manner even after I have asked him to 'stop.' In the month of August, 2021, J[Redacted] assaulted me by punching me on my left arm at which time I firmly warned him to 'stop.' Because I did not welcome J[Redacted]' advances, he began to verbally abuse me, to threaten me and later to physically abuse me. There are two instances (or more) during which J[Redacted] presented himself in my workarea (*sic*) unannounced and with no reason other than to continue with his unwanted sexual advances, using threatening tactics with his 9MM weapon stating that he would 'shoot me' and lastly, striking me with full force on my left arm. I immediately contacted my coworker Jariel Cabel for help and advice on September 2, 2021, I also tried to obtain help removing J[Redacted] from my cubicle in August, 2021, but Jariel did not know how

> to handle this situation, although he stood by and observed J[Redacted]' continued presence in my cubicle.
>
> I reported this second assault incident to HR on September 2, 2021, informing AR[Redacted] of my fear of J[Redacted] and of his comment to "shoot me" while waving his 9MM casing. AR[Redacted] advised me to immediately gather my things and to exit out the back stairwell from the 5th floor [EMPLOYER, REDACTED] exit door. I immediately walked down the 4 flights of stairs to my vehicle located in the garage.

(R. Ex. K, pp. 112-115).

13. Claimant continued to report left shoulder pain and stiffness to Dr. Rojas at a follow-up evaluation on September 30, 2021. Dr. Rojas released Claimant to modified duty from September 30, 2021 to October 7, 2021 with restrictions of no lifting/carrying/pushing/pulling/pinching/gripping over 10 lbs., no overhead reaching, and limiting the use of and resting her left arm as needed.

14. On October 11, 2021 Dr. Rojas continued Claimant's modified duty work restrictions to November 1, 2021.[1]

15. On October 13, 2021, DT[Redacted], Unit Supervisor, emailed Claimant, stating,

> I received an updated worker's comp form indicating that you are able to return to work on modified duty. The clinic should have reached out to you by now, but I have also included the updated form that I received from NM[Redacted] regarding your return to work status. I anticipate that you will be in the office at your normal start time tomorrow, 10/14. I wanted to let you know that we received your PIV card and you will now be able to work from home. IT will need to configure a laptop for you, and I will get that process moving forward. For now, we will be sending you home with a laptop as it fits within the weight restrictions provided by the doctor. We are seeking clarification from your worker's comp specialist about taking monitors home as they may not fall within the restrictions.

(R. Ex. A, p. 3).

16. Respondent filed a General Admission of Liability on October 14, 2021.

17. Employer sent Claimant follow-up emails October 18-20, 2021 stating that Employer had information indicating Claimant should return to work and requesting that Claimant contact Employer to discuss her return to work.

[1] Cl. Ex. 6, p. 53 is a Physician's Report of Worker's Compensation Injury signed by Dr. Rojas indicating Claimant was removed from all work until November 1, 2021. However, Cl. Ex. 6, p. 51is an amended form that details modified duty restrictions in line with Dr. Roja's report on Cl, Ex. 6, p. 49.

18. Dr. Rojas removed Claimant from work from November 1, 2021 to November 23, 2021.

19. On November 9, 2021, Claimant presented to Lupe Ledezma, Ph.D. for psychological evaluation. Claimant reported to Dr. Ledezma that she was punched on her left shoulder in late August and on September 2, 2021. Claimant reported that she experienced immediate sharp pain radiating up the left side of her neck. Claimant complained of anxiety, depression and forgetfulness. Dr. Ledezma concluded that Claimant is experiencing emotional distress related to the assault that occurred at work. Dr. Ledezma diagnosed Claimant with depression, moderate, single episode and acute stress disorder and recommended that Claimant undergo psychotherapy. Claimant subsequently underwent eight sessions of psychotherapy with Dr. Ledezma from December 29, 2021 through April 21, 2022.

20. On November 24, 2021, Dr. Rojas reviewed and signed a position description for an administrator 1 position. Dr. Rojas wrote that he believed Claimant was physically able to perform the job duties, but that she was not able to work in person at the facility due to ongoing PTSD. He explained that Claimant's symptoms were easily triggered at the workplace.

21. On December 14, 2021 Claimant reported to Dr. Rojas experiencing worsening stiffness and pain down her arm with generalized numbness and tingling and limited range of motion. Dr. Rojas continued to remove Claimant from work from December 14, 2021 to January 18, 2022.

22. On January 18, 2022 Dr. Rojas released Claimant to modified duty from January 26, 2022 to February 15, 2022. Dr. Rojas restricted Claimant to only working from home with no use of her left arm.

23. On January 21, 2022, Ms. DT[Redacted] emailed Claimant noting that she had received Claimant's work restrictions releasing her to return to work on January 26, 2022. Ms. DT[Redacted] wrote that, because Claimant was restricted to working from home, Claimant would need to come into the office on January 26, 2022 to obtain her PIV card and equipment. She stated that Shannon from IT would meet Claimant on the 6th floor to configure her computer to be able to work from home.

24. At 5:00 p.m. on January 25, 2022, Claimant emailed Ms. DT[Redacted] asking what security measures had been put into place to protect her from the security guard, J[Redacted]. Claimant noted concerns and indicated she would like to discuss if J[Redacted] was still employed at her worksite, the state CCRD investigation results, her specific work accommodations, and work standards.

25. At 8:26 a.m. on January 26, 2022, Claimant emailed Ms. DT[Redacted] stating that her left shoulder and left arm were in excruciating pain that day, she has received no treatment for her injury, and requested to take "workers' compensation sick leave" for the day.

26. Ms. DT[Redacted] responded to Claimant via at 12:29 p.m. on January 26, 2022. She confirmed with Claimant that J[Redacted] was no longer working at her worksite. She instructed Claimant to contact another individual regarding the state CCRD investigation results, which Employer did not have. Ms. DT[Redacted] noted that Employer had sent Claimant documents in September and November 2021 regarding ADA accommodations but that Claimant had not returned the documents. Ms. DT[Redacted] provided Claimant the contact information for Employer's ADA coordinator. Regarding Claimant's return to work she wrote,

> N[Redacted] requested a description of your job tasks to send to TPA[Third Party Administrator, Redacted]. These tasks were sent to TPA[Redacted] to have Dr. Rojas to evaluate the duties for specific restriction. N[Redacted] indicated that there is no need to wait for that determination and if you are feeling up to coming onsite, the [Employer, Redacted] can set up your laptop as long as you have someone to help you get set up at home. Based on the current restrictions outline (*sic*) in the medical form that you work remote and you are unable to use your left arm, we feel we are able to accommodate these as they are currently stated. Please let me know when you are available to come to the office for computer set up so I can reschedule with [Employer, Redacted] IT and please confirm you have someone to help you set up your equipment at home

(R. Ex. A, p. 12).

27. Claimant again requested to take workers' compensation sick leave via email on January 27, January 28, January 31, February 1-4 and February 7, 2022.

28. On February 1, 2022 Dr. Rojas continued Claimant's work from home only restrictions from February 1, 2022 to March 1, 2022.

29. On February 11, 2022 Dr. Rojas signed off on a job description, noting restrictions of work from home only and no use of the left arm.

30. Claimant underwent a cervical MRI on February 11, 2022 which revealed moderate degenerative changes, including moderate to severe C4-5 and mild to moderate C5-6 central canal stenosis and severe left C4-5 and C5-6 neural foraminal narrowing.

31. On February 15, 2022 Claimant presented to Long Vu, D.O. for a physiatry consultation. Dr. Vu noted that Claimant was neurologically intact on examination. He requested to see Claimant's MRI and EMG results to pinpoint a diagnosis.

32. On February 22, 2022 Claimant underwent a left shoulder MRI which revealed supraspinatus, infraspinatus and subscapularis tendinosis with broad full-thickness tear of the supraspinatus and moderate acromioclavicular osteoarthritis.

33. On March 1, 2022 Dr. Rojas released Claimant to modified duty from March 1, 2022 to March 22, 2022 with 2 lbs. restrictions lifting, carrying, pushing, pulling, pinching, gripping, reaching away from body, and repetitive motion; no overhead reaching; use of left arm as tolerated; and work from home only. Effective March 1, 2022, Employer could not accommodate Claimant's work restrictions, and Claimant did not return to work for Employer from March 1, 2022, through April 24, 2022.

34. Claimant underwent an EMG with Scott Primack, D.O. on March 4, 2022. Dr. Primack concluded that Claimant had clinical and electrophysiologic evidence of moderate right cervical pathology with no right brachial plexopathy or cervical radiculopathy. He opined that there were significant emotional issues surrounding Claimant's case.

35. On March 9, 2022 Dr. Lugliani noted that Claimant was likely a candidate for cervical injections. He referred Claimant to Dr. Griggs for evaluation of her left shoulder. Dr. Lugliani continued Claimant's modified duty restrictions from March 9, 2022 to March 30, 2022.

36. On March 11, 2022 Respondent sent a letter to Dr. Lugliani notifying him that, as of January 26, 2022, Claimant had been advised that the security guard was no longer at her work site. Respondent inquired if there remained any medical need for a work from home only restriction for Claimant. Dr. Lugliani responded on March 21, 2022, opining that the restriction remained necessary pending advisement from a psychologist.

37. On March 23, 2022 Respondent issued a similar letter to Dr. Ledezma inquiring if a work from home restrictions was still needed in Claimant's case. Dr. Ledezma responded on March 24, 2022 stating,

> It is my understanding that all employees in her office are working from home at this time. She is able to go into the office to pick up the equipment that she will need to perform her duties at home. If she needs to do further training in the office, she is able to do that as well.

(Cl. Ex. 8, p. 141).

38. Claimant's care was subsequently transferred to Lawrence Lesnak, M.D. Claimant first presented to Dr. Lesnak on April 25, 2022. Claimant reported that she was punched in her left scapular/suprascapular region on September 2, 2021. Claimant complained of constant left-sided suprascapular/scapular pains and discomfort, but denied any neck, midback or left upper extremity symptoms. Claimant reported that she had not worked since September 3, 2021. On examination, Dr. Lesnak noted that Claimant exhibited diffuse pain behaviors and normal physical findings. He concluded that her subjective complaints were without any correlative reproducible objective findings on examination. Dr. Lesnak noted that Claimant's left shoulder MRI was without any documented evidence of injury or trauma-related pathology, and that the EMG findings were unrelated to the work incident. Dr. Lesnak further noted that Claimant had high level

of depressive symptoms and extremely high level of somatic pain complaints. He opined that Claimant was at maximum medical improvement (MMI) with no need for further treatment, restrictions and no permanent impairment. Dr. Lesnak remarked that, although Claimant may have sustained a mild contusion of her left suprascapular/scapular region as a result of the work incident, there was absolutely no medical evidence to support that she sustained any other type of injury whatsoever.

39. On February 28, 2022 Respondent filed a General Admission of Liability terminating Claimant's TTD benefits based on a modified duty job offer approved by Dr. Rojas.

40. Effective March 1, 2022, the Employer could no longer accommodate Claimant's work restrictions. Claimant did not return to work from March 1, 2022, through April 24, 2022.

41. On March 25, 2022, Claimant applied for a hearing on TTD benefits effective March 1, 2022.

42. On April 21, 2022, Respondent filed a Response to Claimant's Application for Hearing and endorsed withdrawal of admissions.

43. On May 19, 2022, Respondent filed a Final Admission of Liability, noting that compensability was currently being challenged. According to the Final Admission of Liability dated May 19, 2022, Respondent paid TTD benefits (under wage continuation pursuant to §8-42-124, C.R.S.) from September 3, 2021 through January 18, 2022, and TTD benefits from January 19, 2022 through February 22, 2022.

44. Ms. DT[Redacted] credibly testified by deposition on behalf of Respondent. Ms. DT[Redacted] testified that she was Claimant's direct supervisor. She testified that she received notice of Claimant's October 11, 2021 work restrictions, which Employer was able to accommodate. Ms. DT[Redacted] testified that she emailed Claimant to notify Claimant that Employer had work for her. She further testified that in October 2021 Claimant just needed to come into the office to set up her laptop so she could work from home. She testified that Claimant would not have had any interactions with J[Redacted] at that time, as J[Redacted] worked on the 5th floor and Claimant worked on the 6th floor. Ms. DT[Redacted] stated that Claimant did not return to work after the October 13th offer of modified employment. She testified that Employer received notification of Claimant's January 2022 work restrictions, that Employer was able to accommodate those restrictions and sent Claimant email regarding returning to work. Ms. DT[Redacted] testified that Claimant wrote back saying that she had no use of her left arm, to which Ms. DT[Redacted] responded to Claimant and informed her Employer could still accommodate those restrictions. Claimant did not return to work. Ms. DT[Redacted] testified that, to her knowledge, Employer sent a description of modified duty tasks to Claimant's ATP in January 2022, but not in September or October 2021.

45. The ALJ finds that Respondent proved it is more probable than not the assault on September 2, 2021 was inherently personal and did not arise out of Claimant's employment. Respondent proved by a preponderance of the evidence Claimant did not sustain a compensable work injury and that Respondent is permitted to withdraw its admissions of liability.

CONCLUSIONS OF LAW

Generally

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

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

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

Withdrawal of Admission

Withdrawal of an admission is granted prospectively, except in limited situations where the claimant is shown to have fraudulently supplied materially false information upon which the insurer relied in filing the admission. *Rocky Mountain Cardiology v. Indus. Claim Appeals Office*, 94 P.3d 1182 (Colo. App. 2004); *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). *Compare HLJ Mgmt. Group, Inc. v. Kim*, 804 P.2d 250 (Colo. App. 1990), with *Vargo v. Colo. Indus. Comm'n*, 626 P.2d 1164 (Colo. App. 1981)(retroactive relief granted where claimant made fraudulent misstatements regarding specific injury for which benefits were claimed).

When the respondents attempt to modify an issue that previously has been determined by an admission, they bear the burden of proof for the modification. §8-43-201(1), C.R.S.; *see also Salisbury v. Prowers County School District*, WC 4-702-144 (ICAO, June 5, 2012). Section 8-43-201(1), C.R.S. provides, in pertinent part, that "a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification." The amendment to §8-43-201(1), C.R.S. placed the burden on the respondents and made a withdrawal the procedural equivalent of a reopening. *Dunn v. St. Mary Corwin Hospital*, WC 4-754-838-01 (ICAO, Oct. 1, 2013).

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991). The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998).

As Respondent seeks to withdraw its admissions regarding the compensability of Claimant's work injury, it is Respondent's burden to prove it is more probable than not Claimant did not sustain a compensable work injury. There is no dispute Claimant was in the course of her employment when the assault occurred. Therefore, the pertinent question is whether Claimant's work injury arose out of Claimant's employment.

Under the tests set forth by the Colorado Supreme Court involving willful assaults by co-employees, work injuries are broken down into three categories: (1) assaults that have an inherent connection with the employment; (2) assaults that are inherently private; and (3) assaults that are neutral. *Popovich v. Irlando*, *supra*; *see also In re Question Submitted by the U.S. Court of Appeals for the Tenth Circuit*, 759 P.2d 17 (Colo. 1988).

Assaults inherently related to employment are those that have "an inherent connection with employment and emanate from the duties of the job." *Popovich,* 811 P.2d at 383. Included within this category are assaults originating in arguments over work

performance, work equipment, delivery of a paycheck, or termination from work. 1 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law § 8.01[2][b]*, at 8:13-14 (2000). Assaults that are inherently private are those in which "the animosity or dispute that culminates in an assault is imported into the employment" from claimant's or tortfeasor's domestic or private life, and "is not exacerbated by the employment." *Id*., § 8.02[1][a], at 8:42. These cases typically involve disputes over love interests or spouses; they generally involve parties who know one another in private life or, having met on the job, elect to enter into a private relationship just as they might have had they met elsewhere, and subsequently develop a private quarrel*. Id.,* § 8.02[1][a] at 8:48-49. Under these circumstances, there is an insufficient nexus between the assault and the employment conditions or functions for the injury to arise out of employment. *Patel v. Thomas*, 793 P.2d 632, 636-637 (Colo. App. 1990).

The third category of assaults refers to injuries that are attributable to neutral and unexplained forces and are neither personal to either party nor distinctly associated with the employment. *Popovich*, 811 P.2d at 383. Courts have expanded the category of private assaults to include those in which the assailant and victim did not know each other prior to, or associate outside of, the employment and where the victim was specifically chosen or targeted. *See Padron v. Wackenhut Servs*., 58 F. Supp. 2d 1223, 1226 (D. Colo. 1999) (finding the very utterance of allegations that the defendant specifically targeted plaintiff when he stuck his penis in her face and ear suggests that such acts are personal and private in nature); *Ferris v. Bakery, Confectionery & Tobacco Union, Local 26*, 867 P.2d 38, 42 (Colo. App. 1993) (stating that plaintiff presented strong evidence that the union president's unwelcome sexual advances were specifically targeted at her and not neutral in nature, and thus finding a genuine factual controversy regarding the employment nexus); *Stamper v. Hiteshew*, 797 P.2d 784, 786 (Colo. App. 1990) (concluding that the employer's harassing and obscene verbal statements to, and unwelcome sexual touching of, plaintiff were specifically targeted at her and were not neutral in nature). The mere fact that two employees met through their employment is not enough to cause offensive on-the-job conduct between them to fall within the "friction and strain" of the job. *Horodyskyj v. Karanian*, 32 P.3d 470 (Colo. 2001).

Both the first and third categories of assaults are considered to arise out of the employment for the purposes of the Act and therefore prevent an employee from suing her employer in tort for injuries based on such assaults. Only the second category of injuries, inherently private assaults, do not arise out of employment. *Id*.

In *Horodyskyj*, the Colorado Supreme Court addressed whether claims based on sexual harassment and related torts are barred by the exclusivity provisions of the Act. *Horodyskyj* involved an employee who alleged that in the course of his employment, he was sexually harassed by a co-employee who made sexually suggestive remarks to, and unwelcome physical contact with, him. The Court held that, in the usual case, injuries resulting from workplace sexual harassment do not arise out of an employee's employment for purposes of the Act. *Id.* at 474. The Court reasoned that acts of harassment are highly personal and, except in the most unusual cases, will fall into the category of inherently private assaults. *Id. at* 478. The Court further reasoned that the co-

employee's harassing acts did not have an inherent connection to the employment because the acts did not originate in the employee's employment functions, the harassing conduct was specifically targeted at the employee, and the sexually harassing conduct originated in personal matters unrelated to the parties' work functions. The Court therefore concluded there was an insufficient nexus between the conditions of employment and the injury to support a finding that the harassing conduct arose out of the employment.

Here, as in *Horodyskyj*, the preponderant evidence establishes that the assault against Claimant falls into the inherently personal category. Claimant alleges that J[Redacted] did not make any sexual comments to Claimant on the date of the incident and that it is unclear why J[Redacted] struck Claimant. She notes that J[Redacted] began the conversation on September 2, 2021 asking about who would be working the switchboard the following day. To the extent Claimant purports that such question provides a sufficient basis to establish a connection to Claimant's employment functions, the ALJ is not persuaded. No evidence was offered indicating that Claimant or J[Redacted] was responsible for the switchboard, or that their job duties required communicating with each other regarding the switchboard. In fact, Claimant testified that she found it odd that J[Redacted] was asking her about the switchboard because it was not something for which she was responsible. J[Redacted] then proceeded to talk to Claimant about other topics unrelated to Claimant's employment, including the Denver Broncos.

Claimant's September 24, 2021 email to Employer provides further support regarding the personal nature of the assault. In the email, Claimant stated that she had been subject to continuous unwanted sexual advances from J[Redacted]. She specifically stated that J[Redacted] began to threaten and verbally and physically abuse her because she did not welcome his advances. Claimant further goes on to reference two instances during which J[Redacted] came to her cubicle "with no reason other than to continue his unwanted sexual advances, using threatening tactics…" J[Redacted] punched Claimant after she ceased entertaining his conversation. The conversation, as well as various prior interactions between Claimant and J[Redacted], were inherently personal in nature and led to the assault. J[Redacted] specifically targeted his conduct at Claimant due to personal reasons unrelated to any work function. Here, there is an insufficient nexus between the conditions of employment and the assault to support a finding that the harassing conduct arose out of the employment. Accordingly, Respondent proved it is more probable than not Claimant did not sustain a work injury arising out of her employment.

Respondent does not allege that Claimant provided materially false information upon which Respondent relied in filing the admissions. As Claimant did not suffer a compensable work injury, and Respondent does not allege fraud, Respondent shall be permitted to prospectively withdraw its admissions of liability.

ORDER

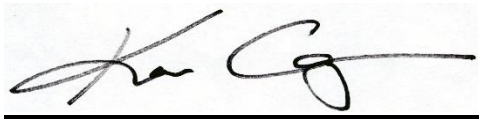
1. Respondent proved by a preponderance of the evidence that the assault on Claimant on September 2, 2021 did not result in a compensable injury, as the assault was inherently personal and did not arise out of Claimant's employment.

2. Respondent's request to withdraw its admission of liability is granted.

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

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

DATED: September 14, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

- Is Claimant entitled to a general award of medical benefits after MMI?

FINDINGS OF FACT

1. Claimant suffered admitted injuries on October 23, 2018 from an assault at work. He fell backwards while retreating from the assailant and injured his head and mid back. He was stabbed in the abdomen, which caused internal intestinal injuries.

2. Claimant underwent abdominal surgery at Parkview Medical Center, and was hospitalized for four days.

3. Employer referred Claimant to CCOM for authorized treatment. His care was initially managed by Dr. Daniel Olson and later Dr. Thomas Centi. Claimant was treated for the abdominal stab wound, a thoracic strain, vertigo, and posttraumatic stress disorder (PTSD).

4. Claimant attended psychological counseling for PTSD with Amy Alsum, LCSW, from January 2019 through March 1, 2019. He was released from care because he was managing his anxiety effectively and felt he required no additional treatment.

5. Claimant was referred to Dr. Michael Sparr for his thoracic injury. He received conservative care, including chiropractic adjustments and trigger point injections. Dr. Sparr discharged Claimant on March 16, 2020 and recommended no additional treatment.

6. Dr. Centi put Claimant at MMI on August 20, 2020, with no impairment and no restrictions. Dr. Centi also opined Claimant required no maintenance care.

7. Claimant attended a Division Independent Medical Examination (DIME) with Dr. Michael Miller on April 14, 2021. Claimant described some residual issues with PTSD, primarily related to social interaction. However, Claimant was managing the PTSD reasonably well and told Dr. Miller, "he does not have any interest in seeing a psychologist again." Claimant reported occasional, brief episodes of vertigo that did not interfere with his activities. Dr. Miller agreed Claimant was at MMI but concluded he qualified for relatively small impairment rating. Claimant's primary ongoing injury-related issue was persistent mid back pain.

8. Dr. Miller agreed Claimant reached MMI on August 20, 2020. He opined Claimant qualified for an impairment rating, primarily for the thoracic spine. Dr. Miller assigned a 5% thoracic spine rating, composed of a 2% specific-disorder rating under Table 53 and 3% for range of motion. He also assigned a 1% psychological rating for mild limitations with interpersonal relationships and recreational activities. Dr. Miller gave no

rating for the vertigo because the intermittent episodes did not interfere with activities of daily living. The was no rating for the digestive system because the injury-related conditions were successfully treated and ongoing issues of gastroparesis, fatty liver, and chronic diarrhea were unrelated to the work accident.

9. Dr. Miller recommended maintenance care of "additional psychological follow-up with Amy Alsum, LCSW or another mental health care provider for a period of 6 months." This recommendation is puzzling because Claimant had already completed psychotherapy and specifically told Dr. Miller he had no interest in additional counseling. The ALJ infers Dr. Miller was simply giving Claimant a window of opportunity for additional therapy should he change his mind. Claimant did not request or otherwise pursue additional psychological treatment within the 6-month window outlined by Dr. Miller.

10. At the DIME, Claimant also described low back pain with "sciatic" leg symptoms, neck pain, and left shoulder pain. The low back pain started in December 2019 and intensified in August 2020. The onset of left shoulder pain occurred in August 2020, and the neck pain started in September 2020. Dr. Miler reviewed imaging studies of Claimant's neck, which showed age-related degenerative changes with no acute injury. A lumbar CT on December 16, 2019 showed degenerative disc disease and a pseudoarticulation. Recent imaging of the left shoulder showed degenerative changes but no rotator cuff tear.

11. Dr. Miller credibly opined the cervical, lumbar, and left shoulder symptoms are unrelated to the work accident because of the lengthy delay before the onset of symptoms and imaging studies showing only age-related degenerative changes. Claimant failed to prove that any treatment for his neck, low back, or left shoulder is causally related to the October 23, 2018 work accident.

12. Claimant failed to prove a probable need for future treatment to relieve the effects of his injury or prevent deterioration of his condition.

CONCLUSIONS OF LAW

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

treatment. *Hanna v. Print Expediters, Inc.*, 77 P.3d 863 (Colo. App. 2003). The claimant must prove entitlement to post-MMI medical benefits by a preponderance of the evidence. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997).

As found, Claimant failed to prove a probable need for future treatment to relieve the effects of his injury or prevent deterioration of his condition. Multiple treating providers agree no additional treatment is needed. The only maintenance care suggested by Dr. Miller was 6 months of psychological counseling. Claimant explicitly stated he was not interested in additional counseling, and did not seek further care within the six-month window offered by Dr. Miller. Indeed, Claimant has not pursued any additional injury-related treatment since being placed at MMI more than two years ago. Given the apparent stability of his condition, there is no persuasive basis to conclude he will deteriorate without additional treatment.

ORDER

It is therefore ordered that:

1. Claimant's claim for medical benefits after MMI is denied and dismissed.

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

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

DATED: September 14, 2022

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-131-553-001

ISSUES

1. Whether Claimant established by a preponderance of the evidence that she sustained a compensable injury arising out of the course of her employment with Employer on February 19, 2020.

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

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

4. Claimant's average weekly wage at the time of injury.

5. Determination of Claimant's authorize treating physician.

FINDINGS OF FACT

1. Claimant was employed by Employer as a preschool assistant, which required Claimant to assist teachers with preschool students, including special education students. On February 19, 2020, Claimant was performing her duties when she picked up and carried a preschool student weighing approximately 40 pounds, down a portion of a flight of stairs and a hallway. Claimant did not slip or fall, or notice that she twisted or injured her ankle when lifting and carrying the student. Claimant continued to work the rest of the day, and did not report any injury to Employer on February 19, 2020.

2. The following morning, February 20, 2020, Claimant woke with pain in her left foot. That morning, at approximately 11:50 a.m., Claimant saw podiatrist, Paul Stone, DPM. Claimant reported bilateral foot and ankle pain mostly in the arch, without a history of trauma. She reported her right foot became painful in August 2019, and that "almost overnight the pain jumped over to the left foot" over the area between the tibial and the navicular tuberosity. Dr. Stone noted a swollen, bulbous area located over the posterior tibial tendon. Claimant reported her right foot had been feeling better since she had started limping on the left foot. Dr. Stone noted Claimant had attempted to treat her foot pain with different at least 20 different over the counter show inserts, without success. Claimant did not report to Dr. Stone her left foot pain began that morning, that it began after carrying a student, or that it was related to her employment. (Ex. F).

3. On examination, Dr. Stone noted the left foot arch was showing signs of collapse. X-rays demonstrated a collapse of the left medial arch, and a large retrocalcaneal exostosis. Based on his examination, he diagnosed Claimant with a left posterior tendon

dysfunction, left bunion deformity, and pronated collapsed left arch. He referred Claimant for an MRI which was performed that day. (Ex. F).

4. The following day, Claimant returned to Dr. Stone. He reviewed the MRI and interpreted it as showing a high-grade tear of the posterior tibial tendon and a high-grade rupture of the ATFL (anterior talofibular ligament) on the ankle with a reported history of instability, and a partial tear of the peroneus brevis. Dr. Stone placed Claimant in a walking boot and recommended physical therapy. (Ex. 8).

5. Claimant later reported a work injury to Employer and was sent a designated provider list on February 24, 2020, which included Elizabeth Bisgard, M.D. at UC Health. (Ex. 6 & C).

6. Claimant went to Dr. Bisgard on February 25, 2020. She reported carrying a preschool student halfway down a flight of stairs and down a hallway, and did not recall any specific event or episode resulting in ankle pain. Claimant reported waking the following morning with pain in her ankle and difficulty walking. Dr. Bisgard reviewed Claimant's MRI report, and performed an examination. She noted that Claimant had "slight tenderness" in the medial ankle with decreased range of motion, and no swelling or ecchymosis. Dr. Bisgard indicated the MRI findings were difficult to attribute to the described work incident, given the lack of a traumatic event. She referred Claimant to Joshua Metzl, M.D., at the UC Health Foot and Ankle Clinic for evaluation and a causation opinion. (Ex. G).

7. On February 27, 2020, Claimant saw Kenneth Hunt, M.D., at UC Health's orthopedic foot and ankle clinic. Claimant reported to Dr. Hunt that her symptoms began at work on February 19, 2020 while helping a student down the stairs, and the following morning she had worsening symptoms. Dr. Hunt recommended Claimant remain in a walking boot, and discussed possible PRP injections. Dr. Hunt offered no opinion as to the cause case of Claimant's left foot and ankle symptoms. (Ex. 7).

8. On March 9, 2020, Claimant saw Dr. Metzl, reporting a history of several car accidents and left ankle pain predating her February 19, 2020 injury. Based on his review of Claimant's MRI, Dr. Metzl opined that Claimant had degenerative tearing of the posterior tibial tendon "with perhaps a more superimposed tear as well." He also noted chronic lateral ligament changes. His impression was "acute on chronic posterior tibial dysfunction." When addressing causation, Dr. Metzl stated "It is certainly possible that her current pain may be related to carrying the child down the stairs but I could not say that with 100 percent certainty." He recommended continued boot immobilization, and physical therapy. He indicated that "as a last resort flatfoot reconstruction with calcaneal osteotomy would be her surgical option." (Ex. H).

9. In July 2020, Claimant underwent an unrelated spinal surgery, and took a leave of absence from work due to the surgery. No documentation of additional treatment or evaluation of her foot or ankle was offered or admitted into evidence, until returned to Dr. Metzl on October 20, 2020, with continued left hindfoot pain with activity. At that visit, Dr. Metzl recommended surgery to address Claimant's flatfoot condition. (Ex. 7). Claimant

underwent a left flatfoot reconstruction surgery left on her left foot on December 2, 2020. Claimant had multiple follow up appointments at Dr. Metzl's clinic between December 17, 2020 and August 10 , 2020, and physical therapy. Other than his initial statement regarding causation, Dr. Metzl offered no further opinions regarding the cause of Claimant's foot/ankle injuries, or whether the surgery performed was reasonably necessary to address any work-related condition.

10. Dr. Bisgard testified by deposition and was admitted as an expert in occupational medicine. Dr. Bisgard opined that it is not probable that Claimant's left foot and ankle symptoms were causally related to Claimant's February 19, 2020 work incident. She credibly testified that the mechanism of injury, as explained by Claimant, would not explain her symptoms or the pathology in her foot, and would not have aggravated preexisting conditions. She testified the Claimant's left foot and ankle MRI did not show a significant tear, but did show evidence of pre-existing pathology. She credibly testified that the Claimant's pathology is typically caused by an impact or rotational injury, which did not occur in this case. Dr. Bisgard opined that had Claimant sustained trauma to her foot or ankle on February 19, 2020, it would have been immediately apparent. Claimant, however, did not relate her symptoms to carrying a child until she saw Dr. Bisgard on February 25, 2020, despite seeing Dr. Stone twice previously. Dr. Bisgard's testimony was credible and persuasive.

11. Claimant testified that on February 19, 2020, she carried a preschool student weighing approximately 40 pound down several stairs and a hallway at approximately 10:30 a.m. She testified she did not have immediate pain, and continued to work the rest of the day until approximately 3:35 p.m. Claimant testified she started to feel pain in her foot at approximately 11:30 a.m. that day, but did not report the incident because she believed the pain would go away. The following morning, she awoke and could not put pressure on her left foot. She then went to Dr. Stone. Claimant testified she has not worked since February 19, 2020, and was ultimately terminated by Employer. Claimant has not returned to work due to ongoing work restrictions. She testified that the December 2, 2020 surgery did not relieve her pain, and that she currently experiences pain due to her left foot.

12. She testified she had prior problems with her left foot, aching on and off, and pain when walking on it. Approximately six months before February 19, 2020, Claimant went to chiropractor Corey Campbell, D.C., and requested an x-ray of her left foot because she had pain in that foot. Dr. Campbell's office performed the x-ray, but provided no other services related to her left foot.

CONCLUSIONS OF LAW

Generally

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

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

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

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

COMPENSABILITY

A claimant's right to recovery under the Workers Compensation Act is conditioned on a finding that the claimant sustained an injury while the claimant was "at the time of the injury, … performing service arising out of and in the course of the employee's employment." § 8-41-301(1)(b), C.R.S.; *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The Claimant must prove her injury arose out of the course and scope of her employment by a preponderance of the evidence. § 8-41-301(1)(b) & (c), C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). "Arising out of" and "in the course of" employment comprise two separate requirements. *Triad Painting Co.*, *supra*.

An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d at 641; *Hubbard v. City Market,* W.C. No. 4-934-689-01 (ICAO, Nov. 21, 2014). The "arising out of" element is narrower and requires claimant to show a

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

However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Atsepoyi v. Kohl's Dept. Stores*, W.C. No. 5-020-962-01, (ICAO, Oct. 30, 2017). The question of whether the requisite causal connection exists is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000). *Fuller v. Marilyn Hickey Ministries, Inc., W.C. No. 4-588-675, (*ICAO, Sept. 1, 2006*).*

Claimant has failed to establish by a preponderance of the evidence that she sustained a compensable injury to her left foot or ankle arising out of the course of her employment with Employer on February 19, 2020. When Claimant first saw Dr. Stone on February 20, 2020, she reported a history of bilateral foot pain, and a shift of pain from her right foot to her left foot. She did not attribute her injury to any specific incident, did not report the pain began on February 19, 2020 or February 20, 2020, and did not relate her condition to her employment. Claimant's reports at her visits with Dr. Stone on February 20, 2020 and February 21, 2020, are inconsistent with her testimony and later description of the injury. The ALJ finds Claimant's report to Dr. Stone that her right foot pain had begun to feel better "since she has been limping on the left," to be inconsistent with an injury on February 19, 2020, and consistent with left foot pain pre-dating February 19, 2020. Claimant did not attribute her ankle pain to a work incident until one week after the alleged incident occurred when she saw Dr. Bisgard. Even then, Claimant denied that she sustained any trauma to her left foot or ankle. The ALJ finds credible Dr. Bisgard's testimony that Claimant's symptoms and pathology are not explained by the reported mechanism of injury.

Most significantly, none of Claimant's treating health care providers opined her left foot/ankle condition was causally related to her employment, or that Claimant's February 19, 2020 work incident exacerbated or aggravated any preexisting condition. The ALJ finds Claimant has failed to establish that her left foot/ankle condition was causally related to her employment or that her condition was aggravated or exacerbated by her work activities.

SPECIFIC MEDICAL BENEFITS and AUTHORIZED TREATING PROVIDER

Under section 8-42-101(1)(a), C.R.S., respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of the industrial injury. *See Owens v. Indus. Claim Appeals Office*, 49 P.3d 1187, 1188 (Colo. App. 2002). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). All results flowing proximately and naturally from an industrial injury are compensable. *Id., citing Standard Metals Corp. v. Ball*, 474 P.2d 622 (Colo. 1970).

Because Claimant has failed to establish a compensable injury, Claimant's claim for medical benefits is denied and dismissed. Claimant's request for determination of her authorized treating physician is denied as moot.

TEMPORARY TOTAL DISABILITY

To prove entitlement to Temporary Total Disability (TTD) benefits, Claimant must prove her industrial injury caused a disability lasting more than three work shifts, she left work as a result of the disability, and the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Indus. Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage-earning capacity as demonstrated by Claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999).

The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) TTD benefits ordinarily continue until terminated by the occurrence of one of the criteria listed in § 8-42-105 (3), C.R.S. The existence of disability is a question of fact for the ALJ. No requirement exists that a claimant produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997).

Because Claimant has failed to establish a compensable injury, Clamant has not established an entitlement to temporary disability benefits. Claimant's request for determination of her average weekly wage is denied as moot.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish that she sustained a compensable injury arising out of the course of her employment with Employer on February 19, 2020. Claimant's claim is denied and dismissed.

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

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

4. All other issues are moot.

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

DATED: September 13, 2022

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

ISSUES

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

FINDINGS OF FACT

1. Claimant works as a Clinical Safety Specialist at the Colorado Mental Health Institute in Pueblo (CMHIP). Her job duties include guarding, monitoring and transporting patients within the facility. At times, she must physically restrain patients and perform "takedowns."

2. Claimant suffered admitted injuries to her right shoulder and low back on April 21, 2021 while restraining a combative patient.

3. Claimant was referred to Southern Colorado Clinic for authorized treatment. Her care was initially managed by Dr. Lakin, and later Dr. Thomas Centi.

4. On July 28, 2021, Dr. Centi recommended that Claimant continue using a TENS unit, in conjunction with medications and massage therapy.

5. Claimant saw Dr. Scott Primack twice, in August and September 2021. Dr. Primack recommended physical therapy for Claimant's back and shoulder. At the second and final evaluation on September 20, 2021, Dr. Primack noted Claimant was improving. He did not think she needed injections to her low back or shoulder, and released her from care.

6. Claimant saw Dr. Timothy Sandell on September 24, 2021. Dr. Sandell administered a right SI joint injection.

7. Claimant followed up with Dr. Sandell on October 11, 2021. She described "90 to 95%" improvement from the injection, and had pain only with certain activities. She was scheduled to continue with physical therapy. Dr. Sandell opined, "She is a candidate for repeating the injection at any time. She is doing well at this time and therefore we will hold off. Hopefully, ongoing physical therapy will be successful and prevent the need for repeat injection." He released Claimant to follow-up "as needed."

8. Claimant had several months of good relief from the SI joint injection.

9. Dr. Richard Stockelman, an orthopedic surgeon, provided injections to Claimant's shoulder. The injections were helpful.

10. On November 16, 2021, Claimant's physical therapist noted she was still receiving relief from the TENS unit.

11. Claimant completed a Functional Capacity Evaluation (FCE) on December 10, 2021. Claimant demonstrated the ability to work at the medium exertional level, with frequent reaching in all directions.

12. On January 4, 2022, Dr. Sandell issued a report addressing maintenance care. He opined Claimant may need additional therapy, medication, physician visits, or injections, "on an as-needed basis if the symptoms return or persist."

13. Dr. Centi put Claimant at MMI on January 11, 2022 with a 12% whole person impairment for her lumbar spine. Dr. Centi released Claimant to full duty and opined she required no ongoing treatment.

14. Respondent filed Final Admissions of Liability (FALs) on February 3, 2022 and March 16, 2022 admitting for the 12% whole person rating. The FALs denied liability for medical benefits after MMI based on Dr. Centi's report.

15. Claimant has been working without restrictions since MMI. She has performed all duties without apparent difficulty, including restraining patients.

16. Claimant followed up with Dr. Stockelman on April 29, 2022. Her primary complaint that day was her right knee (which is unrelated to the April 21, 2021 accident). But they also discussed her right shoulder. Claimant described her shoulder pain as "intermittent and not severe." Dr. Stockelman noted, "[Claimant] is satisfied with her shoulder at this time at least to the point where she does not want any intervention. It still hurts on occasion but not bad enough for another injection and certainly not enough for surgery." Dr. Stockelman prescribed a Medrol Dosepak, "which will help her knees and her shoulder."

17. Claimant's supervisor, Mr. V[Redacted], described Claimant as a "highly motivated" and "team-oriented" employee who does "good quality work" and enjoys helping patients. Mr. V[Redacted] has no concerns about Claimant's ability to perform her regular duties since being put at MMI, and she has completed all tasks without complaint. Claimant has occasionally mentioned soreness in her shoulder and back after restraining patients, but Mr. V[Redacted] assumed it was just the typical "bumps and bruises" from restraining patients.

18. Claimant credibly testified to approximately 3-4 episodes of right shoulder pain per week that occasionally interferes with her sleep and limits her activities. She credibly testified her low back is doing "OK" but flares occasionally "in that same area." Claimant testified the SI joint injection was helpful for several months. She would like the option to follow up with an ATP regarding potential treatment to relieve her ongoing symptoms. Claimant has not pursued additional treatment because she is worried about the cost without approval from Respondent.

19. As of the hearing, Claimant continued to obtain refills of supplies for her TENS unit approximately once per month.

20. Claimant proved a probable need for future treatment to relieve the effects of her compensable injury or prevent deterioration of her condition.

CONCLUSIONS OF LAW

The respondents are liable for authorized medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101(1)(a); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Medical benefits may extend beyond MMI if a claimant requires treatment to relieve symptoms or prevent deterioration of their condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). If the claimant establishes the probability of a need for future treatment, he is entitled to a general award of medical benefits after MMI, subject to the respondents' right to dispute causation or reasonable necessity of any particular treatment. *Hanna v. Print Expediters, Inc.*, 77 P.3d 863 (Colo. App. 2003). Proof of a current or future need for "any" form of treatment will suffice for an award of post-MMI benefits. *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995). The claimant must prove entitlement to post-MMI medical benefits by a preponderance of the evidence. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997).

As found, Claimant proved a probable need for future treatment to relieve the effects of her compensable injury and prevent deterioration of her condition. Claimant's testimony is credible. Although Claimant's condition improved with treatment, she continues to experience intermittent injury-related symptoms that affect her activities. The SI injection was helpful, but wore off after a few months. Dr. Sandell credibly opined that Claimant is a candidate for additional injections "at any time," and that she may require additional treatment for recurrent or persistent symptoms. Claimant also continues to receive regular refills of supplies for her TENS unit.

ORDER

It is therefore ordered that:

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

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

procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: September 16, 2022

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

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered a right shoulder injury during the course and scope of his employment with Employer on April 3, 2021.

2. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to reasonable, necessary and causally related medical benefits as a result of his April 3, 2021 injury.

FINDINGS OF FACT

1. Claimant worked for Employer at its meat-packing plant performing clean-up duties. He specifically cut waste from cow carcasses and removed the debris with a shovel.

2. On April 1, 2021 Claimant sustained an admitted injury to his right shoulder arising out of and in the course and scope of his employment with Employer. Claimant submitted an "Employee Statement of Injury" to Employer in which he noted he was lifting meat waste into a can when he sustained an injury to his right shoulder, both legs, left hip and back. Claimant received treatment through Employer's on-site medical clinic under the care of Authorized Treating Physician (ATP) Carlos Cebrian, M.D.

3. On April 1, 2021 Claimant visited Dr. Cebrian for an examination. Claimant remarked that his right shoulder had been sore over the previous month, but he recently experienced increased symptoms. He had been performing cleanup jobs by using a knife to cut waste off carcasses and a shovel to remove the material. Dr. Cebrian noted a prominence at the AC joint and pain with movement. He diagnosed Claimant with an AC joint separation. Dr. Cebrian determined that Claimant's April 1, 2021 injury was caused by his work activities. He assigned right upper extremity work restrictions of no lifting in excess of five pounds, no overhead lifting, and no use of tools.

4. Because the April 1, 2021 incident was a non-lost-time injury, Respondents did not report the claim to the Division of Workers' Compensation. Moreover, no Workers' Compensation number was assigned to the April 1, 2021 claim.

5. On April 2, 2021 Employer assigned Claimant the light duty job of "turning cattle." The cattle turning position required Claimant to rotate cattle carcasses suspended on a swivel. Claimant began his light duty work on April 2, 2021.

6. Because of his work restrictions, Claimant began performing the cattle turning position using his previously-injured left arm. In 2005 Claimant had injured his left upper extremity when he suffered a gunshot wound to his left forearm. As a result of the

injury, Claimant has a plate and screws in his left forearm as well as several metallic fragments in the arm.

7. On April 3, 2021 Claimant submitted a second "Employee Statement of Injury" to Employer. The date of injury was listed as April 2, 2021. Claimant noted the injury occurred from "[t]urning cows left handed with arm injured in gunshot." The injury involved the left forearm. Claimant remarked that the injury involved tight tendons and numbness. The affected body parts included the lower wrist, thumb, pinky areas and fingers.

8. The April 2, 2021 claim for the left upper extremity was designated as W.C. No. 5-171-541. Respondents denied liability for the claim. The issue of compensability of the April 2, 2021 left forearm injury thus proceeded to hearing on September 21, 2021 before ALJ Steven Kabler. In his November 2, 2021 Findings of Fact, Conclusions of Law, and Order, ALJ Kabler denied the claim and found that Claimant failed to establish he sustained a compensable injury to his left forearm on April 2, 2021.

9. On April 3, 2021 the date on which Claimant reported his April 2, 2021 left forearm injury, he complained to his supervisor Mr. C[Redacted] that turning cows using his right arm increased his right shoulder pain. Claimant had been turning cows for approximately three hours from 9:00 a.m. until 12:00 p.m. on April 3, 2021. Mr. C[Redacted] took Claimant to the in-house clinic where a nurse, after consulting with a doctor, determined that turning cows fit within Claimant's work restrictions.

.10. After completing his work shift on April 3, 2021 Claimant visited the emergency room at East Morgan County Hospital. Claimant reported right shoulder discomfort with an onset one month earlier and increased pain while at work. The degree of pain was described as "minimal" with no swelling. Movement exacerbated the pain, but Claimant denied any significant change with overhead activity. An addendum to the report stated that the radiologist noticed a small avulsion fracture off the acromion that appeared to be old, and supported a diagnosis of rotator cuff disease. Claimant did not report an injury to Employer on April 3, 2021.

11. On April 6, 2021 Claimant returned to Dr. Cebrian for an evaluation. Dr. Cebrian assessed a possible "AC joint separation with aggravation due to work duties" and "a nondisplaced fracture at the tip of the acromial process." He restricted Claimant to no use of the right arm. Dr. Cebrian ordered an MRI as a diagnostic test for the April 1, 2021 right shoulder injury. He testified that he had no knowledge of a separate right shoulder injury that occurred on April 3, 2021 and the record does not reflect any mention of a new injury on the date.

12. The April 7, 2021 right shoulder MRI demonstrated mild supraspinatus tendinosis with no full-thickness tear of the rotator cuff and trace amounts of subacromial subdeltoid fluid. The MRI also revealed mild-to-moderate spurring and bone marrow edema at the AC joint as well as impingement. Dr. Cebrian referred Claimant to orthopedic surgeon Joseph Hsin, M.D. for an examination.

13. On April 21, 2021 Claimant visited Dr. Hsin for an examination. Dr. Hsin diagnosed Claimant with rotator cuff tendinitis and impingement due to bone spurs. He also administered a cortisone injection to Claimant's right shoulder. Claimant did not mention a work injury that occurred on April 3, 2021.

14. On May 25, 2021 Dr. Cebrian determined that Claimant had reached Maximum Medical Improvement (MMI) for his April 1, 2021 right shoulder injury. He did not assign any permanent impairment or work restrictions. Dr. Cebrian's final diagnosis was aggravation of the AC joint and osteoarthritis of the right shoulder.

15. On November 10, 2021 Claimant filed a Workers' Claim for Compensation for the April 3, 2021 right shoulder injury. Claimant filed an Application for Expedited Hearing on the issue of compensability and medical benefits for the April 3, 2021 incident. Claimant's Application for Expedited hearing is limited to the issues of whether he sustained a compensable injury to his left upper extremity on April 3, 2021 and is entitled to corresponding medical benefits. Respondents filed a Notice of Contest on December 10, 2021.

16. On November 17, 2021 Dr. Cebrian drafted a comprehensive report addressing Claimant's April 3, 2021 right shoulder symptoms. He remarked that it was the first he had become aware of Claimant's assertion that he had suffered an acromial fracture on April 3, 2021 while turning cows. Dr. Cebrian commented that the minimally-displaced fracture at the tip of the acromial process, which appeared to be old, was not visible on the April 7, 2021 MRI. The fracture also did not appear in a September 2021 x-ray. The findings confirmed for Dr. Cebrian that any fracture pre-dated April 3, 2021. Dr. Cebrian also explained that Claimant had sustained an injury to his right shoulder and AC joint in a January 2021 motor vehicle accident. He testified that, because of the complexities involving the new April 3, 2021 claim, he asked Claimant to return in approximately two weeks so he could provide a causation determination.

17. On November 30, 2021 Claimant returned to Dr. Cebrian for an evaluation. After reviewing Claimant's medical records, Dr. Cebrian concluded that Claimant did not sustain a new injury or aggravate his right shoulder condition on April 3, 2021. Although Claimant may have experienced discomfort, Dr. Cebrian emphasized that there was no distinct injury on April 3, 2021. Instead, Claimant likely aggravated his April 1, 2021 right shoulder injury. Dr. Cebrian explained that, even if Claimant had suffered a new injury on April 3, 2021, he had been thoroughly evaluated and received injections. Dr. Cebrian referred Claimant back to Dr. Hsin for a surgical consultation.

18. On January 24, 2022 Claimant underwent an independent medical examination with Timothy S. Obrien, M.D. Dr. O'Brien reviewed Claimant's medical records and conducted a physical examination. He recounted that Claimant had been involved in a motor vehicle accident and injured his right shoulder in January, 2021. Dr. O'Brien also remarked that Claimant is an avid weightlifter and bodybuilder. He reasoned that it is likely Claimant suffers from pre-existing osteoarthritis of the AC joint as a result of his aggressive weightlifting and bodybuilding lifestyle.

19. In relevant part, Dr. O'Brien concluded that Claimant did not suffer a new right shoulder injury on April 3, 2021 while working in the cow turner position for Employer. He specifically explained that there was no mechanism of injury that could have produced a fracture of Claimant's right shoulder acromion. Dr. O'Brien reasoned that turning beef is "not the type of activity that results in separation of the bone at the level of the acromion." Notably, an acromial fracture occurs as a result of a high energy blunt trauma. Dr. O'Brien concluded that Claimant's appearance, examination findings and imaging studies reveal that he did not suffer a work injury on April 3, 2021.

20. Claimant challenged Dr. Cebrian's MMI determination regarding the April 1, 2021 right shoulder injury and sought a Division Independent Medical Examination (DIME). On April 12, 2022 Claimant underwent a DIME with Alicia Feldman, M.D. Claimant described his April 1, 2021 right shoulder injury and also mentioned that he again hurt his right shoulder on April 3, 2021 while working for Employer. Dr. Feldman determined Claimant had not reached MMI for the April 1, 2021 injury. She recommended additional therapy and a return to orthopedic surgeon Dr. Hsin.

21. On June 30, 2022 Dr. Hsin performed a right shoulder glenohumeral arthroscopy with the following: (1) debridement of the labrum; (2) bursectomy, acromioplasty, and decompression; and (3) partial distal claviculectomy. The postoperative diagnosis was right shoulder impingement syndrome, distal clavicle arthritis and a labral tear.

22. Dr. Cebrian testified that Dr. Hsin had described Claimant's labral tear as small and only requiring debridement or smoothing. The primary problem with Claimant's right shoulder involved large osteophytes or bone spurs that protruded down towards the rotator cuff and reflected a quite arthritic shoulder. Dr. Hsin removed bone spurs and removed the end of the distal clavicle to create space. Claimant subsequently underwent rehabilitation for the surgery.

23. Dr. Cebrian maintained that Claimant did not suffer a new injury or aggravate his right shoulder condition on April 3, 2021. He also remarked that it was impossible to determine when Claimant's small labral tear occurred. It was just as likely the tear existed prior to April 3, 2021. Turning the cows would not have caused a labral tear or acromial fracture in Claimant's right shoulder. Dr. Cebrian reasoned that, although Claimant suffered pain on April 3, 2021 his symptoms were related to his April 1, 2021 admitted injury.

24. Dr. Cebrian explained that the job of turning cows constitutes an insignificant mechanism to cause an aggravation, fracture, or torn labrum. He noted that Claimant had only performed the job for no more than three hours on April 3, 2021. Cow turning merely involves swiveling carcasses on a hook. Based on Employer's job analysis, cow turning only involves exerting about 3 ½ pounds of force with a tool, or slightly more force without a tool, as performed by Claimant. Dr. Cebrian did not doubt that Claimant felt some discomfort while turning cows, but his actions on April; 3, 2021 did not cause a distinct injury or new pathology.

25. Claimant has failed to establish that it is more probably true than not that he injured his right shoulder during the course and scope of his employment with Employer on April 3, 2021. Initially, Claimant assets that on April 3, 2021 he injured his right shoulder while working in the light duty position of cow turner for Employer. The cattle turning position required Claimant to rotate cattle carcasses suspended on a swivel. Claimant was working in a light duty position because he had suffered an admitted right shoulder injury two days earlier on April 1, 2021. ATP Dr. Cebrian diagnosed Claimant's April 1, 2021 injury as an AC joint separation. He assigned right upper extremity work restrictions of no lifting in excess of five pounds, no overhead lifting, and no use of tools.

26. An April 7, 2021 MRI of Claimant's right shoulder demonstrated mild supraspinatus tendinosis with no full-thickness tear of the rotator cuff and trace amounts of subacromial subdeltoid fluid. The MRI also revealed mild-to-moderate spurring and bone marrow edema at the AC joint as well as impingement. Dr. Cebrian referred Claimant to orthopedic surgeon Joseph Hsin, M.D. for an examination. After Dr. Hsin administered a cortisone injection, Dr. Cebrian determined Claimant reached MMI on May 25, 2021 for the April 1, 2021 injury with no permanent impairment.

27. On April 12, 2022 Claimant underwent a DIME with Dr. Feldman to challenge Dr. Cebrian's MMI determination. Dr. Feldman determined Claimant had not reached MMI for the April 1, 2021 injury. She recommended additional therapy and a return to Dr. Hsin. On June 30, 2022 Dr. Hsin performed a right shoulder glenohumeral arthroscopy with the following: (1) debridement of the labrum; (2) bursectomy, acromioplasty, and decompression; and (3) partial distal claviculectomy. The postoperative diagnosis was right shoulder impingement syndrome, distal clavicle arthritis and a labral tear.

28. Although Claimant asserts that turning cows injured his right shoulder, the medical records and persuasive medical opinions reflect that Claimant likely did not suffer a new injury on April 3, 2021. After reviewing Claimant's medical records, Dr. Cebrian persuasively concluded that Claimant did not sustain a new injury or aggravation to his right shoulder on April 3, 2021. He explained that the minimally-displaced fracture at the tip of the acromial process, which appeared to be old, was not visible on the April 7, 2021 MRI. The fracture also did not appear in a September 2021 x-ray. The findings confirmed for Dr. Cebrian that any fracture pre-dated April 3, 2021. Dr. Cebrian testified that Dr. Hsin had described Claimant's labral tear as small and only requiring debridement or smoothing. The primary problem with Claimant's right shoulder involved large osteophytes or bone spurs that protruded down towards the rotator cuff and reflected a quite arthritic shoulder.

29. Dr. Cebrian explained that, although Claimant may have experienced discomfort, he did not suffer a distinct injury on April 3, 2021. He remarked that the job of turning cows constitutes an insignificant mechanism to cause an aggravation, fracture, or torn labrum. Dr. Cebrian noted that Claimant had only performed the job for no more than three hours on April 3, 2021. Cow turning merely involves swiveling carcasses on a hook. Based on Employer's job analysis, cow turning requires exerting only about 3 ½ pounds

of force with a tool, or slightly more force without a tool, as performed by Claimant. Dr. Cebrian did not doubt that Claimant felt some discomfort while turning cows, but his actions on April; 3, 2021 did not cause a distinct injury or new pathology.

30. Similarly, Dr. O'Brien concluded that Claimant did not suffer a new right shoulder injury on April 3, 2021 while working in the cow turner position for Employer. He specifically explained that there was no mechanism of injury that could have produced a fracture of Claimant's right shoulder acromion. Dr. O'Brien reasoned that turning beef is "not the type of activity that results in separation of the bone at the level of the acromion." Notably, an acromial fracture occurs as a result of a high energy blunt trauma. Dr. O'Brien concluded that Claimant's appearance, examination findings and imaging studies revealed that he did not suffer a work injury on April 3, 2021.

31. Based on the medical records and persuasive opinions of Drs. Cebrian and O'Brien, Claimant has failed to demonstrate that he suffered a right shoulder injury on April 3, 2021. His work activities in turning cows on April 3, 2021 did not aggravate, accelerate or combine with his pre-existing condition to produce a need for medical treatment. As Dr. Cebrian noted, although Claimant suffered pain on April 3, 2021, his symptoms were related to his April 1, 2021 admitted injury. Notably, Claimant underwent conservative therapy and ultimately surgery for his April 1, 2021 injury. Accordingly, Claimant's request for Workers' Compensation benefits based on an April 3, 2021 date of injury is denied and dismissed.

CONCLUSIONS OF LAW

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

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

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

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

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

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

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

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

course of the employment"). While scientific evidence is not dispositive of compensability, the ALJ may consider and rely on medical opinions regarding the lack of a scientific theory supporting compensability when making a determination. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020).

8. As found, Claimant has failed to establish by a preponderance of the evidence that he injured his right shoulder during the course and scope of his employment with Employer on April 3, 2021. Initially, Claimant assets that on April 3, 2021 he injured his right shoulder while working in the light duty position of cow turner for Employer. The cattle turning position required Claimant to rotate cattle carcasses suspended on a swivel. Claimant was working in a light duty position because he had suffered an admitted right shoulder injury two days earlier on April 1, 2021. ATP Dr. Cebrian diagnosed Claimant's April 1, 2021 injury as an AC joint separation. He assigned right upper extremity work restrictions of no lifting in excess of five pounds, no overhead lifting, and no use of tools.

9. As found, an April 7, 2021 MRI of Claimant's right shoulder demonstrated mild supraspinatus tendinosis with no full-thickness tear of the rotator cuff and trace amounts of subacromial subdeltoid fluid. The MRI also revealed mild-to-moderate spurring and bone marrow edema at the AC joint as well as impingement. Dr. Cebrian referred Claimant to orthopedic surgeon Joseph Hsin, M.D. for an examination. After Dr. Hsin administered a cortisone injection, Dr. Cebrian determined Claimant reached MMI on May 25, 2021 for the April 1, 2021 injury with no permanent impairment.

10. As found, on April 12, 2022 Claimant underwent a DIME with Dr. Feldman to challenge Dr. Cebrian's MMI determination. Dr. Feldman determined Claimant had not reached MMI for the April 1, 2021 injury. She recommended additional therapy and a return to Dr. Hsin. On June 30, 2022 Dr. Hsin performed a right shoulder glenohumeral arthroscopy with the following: (1) debridement of the labrum; (2) bursectomy, acromioplasty, and decompression; and (3) partial distal claviculectomy. The postoperative diagnosis was right shoulder impingement syndrome, distal clavicle arthritis and a labral tear.

11. As found, although Claimant asserts that turning cows injured his right shoulder, the medical records and persuasive medical opinions reflect that Claimant likely did not suffer a new injury on April 3, 2021. After reviewing Claimant's medical records, Dr. Cebrian persuasively concluded that Claimant did not sustain a new injury or aggravation to his right shoulder on April 3, 2021. He explained that the minimally-displaced fracture at the tip of the acromial process, which appeared to be old, was not visible on the April 7, 2021 MRI. The fracture also did not appear in a September 2021 x-ray. The findings confirmed for Dr. Cebrian that any fracture pre-dated April 3, 2021. Dr. Cebrian testified that Dr. Hsin had described Claimant's labral tear as small and only requiring debridement or smoothing. The primary problem with Claimant's right shoulder involved large osteophytes or bone spurs that protruded down towards the rotator cuff and reflected a quite arthritic shoulder.

12. As found, Dr. Cebrian explained that, although Claimant may have experienced discomfort, he did not suffer a distinct injury on April 3, 2021. He remarked that the job of turning cows constitutes an insignificant mechanism to cause an aggravation, fracture, or torn labrum. Dr. Cebrian noted that Claimant had only performed the job for no more than three hours on April 3, 2021. Cow turning merely involves swiveling carcasses on a hook. Based on Employer's job analysis, cow turning requires exerting only about 3 ½ pounds of force with a tool, or slightly more force without a tool, as performed by Claimant. Dr. Cebrian did not doubt that Claimant felt some discomfort while turning cows, but his actions on April; 3, 2021 did not cause a distinct injury or new pathology.

13. As found, similarly, Dr. O'Brien concluded that Claimant did not suffer a new right shoulder injury on April 3, 2021 while working in the cow turner position for Employer. He specifically explained that there was no mechanism of injury that could have produced a fracture of Claimant's right shoulder acromion. Dr. O'Brien reasoned that turning beef is "not the type of activity that results in separation of the bone at the level of the acromion." Notably, an acromial fracture occurs as a result of a high energy blunt trauma. Dr. O'Brien concluded that Claimant's appearance, examination findings and imaging studies revealed that he did not suffer a work injury on April 3, 2021.

14. As found, based on the medical records and persuasive opinions of Drs. Cebrian and O'Brien, Claimant has failed to demonstrate that he suffered a right shoulder injury on April 3, 2021. His work activities in turning cows on April 3, 2021 did not aggravate, accelerate or combine with his pre-existing condition to produce a need for medical treatment. As Dr. Cebrian noted, although Claimant suffered pain on April 3, 2021, his symptoms were related to his April 1, 2021 admitted injury. Notably, Claimant underwent conservative therapy and ultimately surgery for his April 1, 2021 injury. Accordingly, Claimant's request for Workers' Compensation benefits based on an April 3, 2021 date of injury is denied and dismissed.

ORDER

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

Claimant's claim for Workers' Compensation benefits as a result of his April 3, 2021 work activities is denied and dismissed.

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

For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at https://oac.colorado.gov/resources/oac-forms.

DATED: September 16, 2022.

DIGITAL SIGNATURE:
Peter J. Cannici

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-063-493-004

ISSUES

The issues set for determination included:

- Did Respondent prove by a preponderance of the evidence that it is entitled to recover an overpayment of PPD benefits from Claimant?

- Is Respondent's overpayment claim barred by the statute of limitations §8-42-113.5(1)(b.5)(I), C.R.S.; (c) if Respondent met its burden, what is the rate of repayment of the overpayment?

PROCEDURAL HISTORY

The undersigned issued a Summary Order on August 2, 2022. Respondent requested a full Order on August 8, 2022, which was received on August 9, 2022. This Order follows.

FINDINGS OF FACT

1. Claimant worked as a uniformed officer for Respondent. There was no evidence she sustained a left arm injury before 2018.[1]

2. On August 12, 2017, Claimant sustained an admitted industrial injury to her left arm when she was involved in altercation with a suspect.[2]

3. Claimant initially received conservative treatmen for the injury to her left arm, which included medications and physical therapy ("PT").

4. She underwent left ulnar nerve neurolysis and transposition surgery on December 6, 2017.

5. ATP John Sacha, M.D. concluded Claimant reached MMI on June 11, 2018. Dr. Sacha determined Claimant sustained a permanent medical impairment of 8% (scheduled) rating, including a 2% due to a loss of range of motion ("ROM") and 6% due to left ulnar motor loss.

6. Another ATP, Gerald Solot, M.D. placed Claimant at MMI on June 22, 2018 and assigned a scheduled impairment rating of 6%. Dr. Sacha performed a second impairment rating on July 9, 2018, which was consistent with Dr. Solot's.

[1] Exhibit C, p. 27.

[2] *Id.*

7. On July 19, 2018, Respondent filed a final Admission of Liability ("FAL") consistent with Dr. Solot's rating. PPD benefits paid pursuant to the FAL totaled $3,713.55.[3]

8. Claimant filed a timely objection to the FAL and requested a DOWC-sponsored IME. The DIME was conducted on November 30, 2018 by James Regan, M.D. Dr. Regan agreed Claimant reached MMI on June 22, 2018 and assigned a 15% left upper extremity rating.

9. On January 3, 2019, Respondent filed an amended FAL, admitting for Dr. Regan's rating.[4] The FAL admitted for PPD benefits totaling $9,283.87. The PPD benefits were paid out to Claimant.[5]

10. Claimant filed an Application for Hearing seeking a conversion of the scheduled impairment rating to a whole person impairment rating. In its Response to Application for Hearing, Respondent endorsed the issue of overcoming the DIME with respect to impairment.

11. A hearing took place on September 12, 2019 before Administrative Law Judge Margot Jones. The ALJ issued a Findings of Fact, Conclusions of Law and Order on October 16, 2019 which determined found that Respondent overcame Dr. Regan's findings. ALJ Jones concluded Claimant sustained a permanent medical impairment of 6% (scheduled). An overpayment of PPD benefits arose as a result of ALJ Jones Order and amounted to $5,570.32.[6]

12. Claimant appealed this Order to the Industrial Claim Appeals Office. The ICAO affirmed the decision of ALJ Jones and issued a Final Order on April 24, 2020. No further appeals were taken and ALJ Jones' Order regarding the overpayment was final.

13. On April 28, 2020, Respondent filed an amended FAL which documented an overpayment in the amount of $5,570.32.

14. The ALJ determined the one-year statute of limitations began to run once ALJ Jones' Order became final. The Order became final after all appeals were exhausted. Accordingly, the ALJ found Respondent had until April 5, 2021 to file an AFH to recoup the overpayment.

15. Respondent sent a letter to Claimant's attorney, dated January 20, 2021 requesting repayment of the overpayment.

---

[3] Exhibit A.

[4] Exhibit B.

[5] Exhibit F.

[6] Exhibit C, p.36.

16. On February 3, 2021, Respondent filed an AFH, seeking to recover the overpayment. The ALJ determined the filing of the AFH was within the one-year statute of limitations.

17. The ALJ found the filing of the AFH on February 3, 2021 was action taken by Respondent to recover the overpayment.

18. There was no evidence in the record concerning Claimant‘s ability to repay the overpayment.

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

CONCLUSIONS OF LAW

General

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

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). The ALJ must make specific findings only as to the evidence found persuasive and determinative. An ALJ “operates under no obligation to address either every issue raised or evidence which he or she considers to be unpersuasive”. *Sanchez v. Indus. Claim Appeals Office of Colo.*, 411 P.3d 245, 259 (Colo. App. 2017), citing *Magnetic Engineering Inc. v. Indus. Claim Appeals Office*, *supra*, 5 P.3d at 389.

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

Statute of Limitations Defense

As determined in Findings of Fact 1 through 4, Claimant was employed by Respondent as a uniformed officer and suffered an admitted work injury to her left arm

on August 12, 2017. She received medical treatment for her arm injury which included surgery. *Id.* One of Claimant's ATP's (Dr. Sacha) placed her MMI on June 11, 2018. In a subsequent evaluation, Dr. Solot, who was also in ATP, determined Claimant was at MMI and assigned a scheduled impairment rating of 6%, which converted to a 4% whole person impairment. Dr. Sacha then performed a second evaluation of Claimant's impairment on July 9, 2018, which was consistent with Dr. Solot's. (Finding of Fact 6). On July 19, 2018, Respondent filed an FAL that admitted for the 6% scheduled impairment rating. (Finding of Fact 7).

After Claimant underwent a DIME, which was performed by Dr. Reagan, an FAL was filed on behalf of Respondent for Dr. Regan's rating. (Finding of Fact 9). The case proceeded to hearing on Claimant's AFH, at which time she sought a conversion of the scheduled impairment rating to a whole person rating. (Finding of Fact 10). Claimant did not prevail at hearing and the ALJ concluded her medical impairment rating was the scheduled rating issued by ATP, Dr. Solot. (Finding of Fact 11). By virtue of the previously filed FAL, an overpayment of PPD benefits existed in the amount of $5,570.32. Claimant filed a timely appeal of the Order, which was ultimately affirmed by the ICAO. (Finding of Fact 12). No further appeals were taken. The ALJ concluded that once the ICAO Order became final, the one-year statute began to run. (Finding of Fact 14). The deadline taking action to recoup the overpayment was April 5, 2021. (Finding of Fact 14).

As a threshold issue, the ALJ considered whether Respondent proved the existence of an overpayment and whether the claim of overpayment was barred by the one-year statute of limitations. Respondent sought to recover the overpayment and argued that the statute of limitations did not begin to run until the ICAO issued its Final Order. Claimant, on the other hand, argued that Respondent was aware of the overpayment prior to that and the one-year statute had run.

As found, an overpayment of PPD benefits occurred in the case at bench. (Finding of Fact 11). Claimant was overpaid in the amount of $5,570.32 in PPD benefits, which was established by the evidence in the record. The ALJ determined the filing of the AFH on constituted action taken by Respondent to recover the overpayment. (Finding of Fact 17). *Peoples v. ICAO*, 457 P.2d 143, 148-149 (Colo. App. 2019). Respondent's claim to recoup the overpayment was filed after the ICAO Order became final and was not barred by the applicable statute of limitations. (Finding of Fact 14). Based upon the evidence admitted at hearing, the ALJ concluded Respondent filed the AFH before the statute of limitations ran and, therefore was timely. (Finding of Fact 16).

Overpayment

An ALJ in a workers' compensation claim has authority to order repayment of overpayment. *Simpson v. ICAO, 219 P.3d 354 (Colo. App. 2010) rev'd on other grounds, Benchmark/Elite, Inc. v. Simpson, 232 P.3d, 777 (Colo. 2010).* In the recent case of *Turner v. Chipolte Mexican Grill,* W.C. 4-893-631-07 (ICAO, February 8, 2018), the ICAO affirmed an ALJ's ability to order recovery of overpayment. *Peoples v. ICAO*, *supra,* 457 P.2d at 148.

Specifically, § 8-40-201(15.5), C.R.S. was amended in 2021 to read as follows:

"Overpayment means money received by a claimant that:

(a) (I) Is the result of fraud;

(II) Is the result of an error due only to miscalculation, omission, or clerical error asserted in a new admission of liability filed within thirty days of the erroneous admission of liability;

(III) Is paid in error or inadvertently in excess of an admission or order that exists at the time that the benefits are paid to a claimant; or

(IV) Results in duplicate benefits because of offsets that reduce disability or death benefits payable under articles 40 to 47 of this title 8. Duplicate benefits include any wages earned by a claimant in the same or other employment while a claimant is also receiving temporary disability benefits.

(b) For an overpayment to result, it is not necessary that the overpayment exist at the time the claimant received disability or death benefits under articles 40 to 47 of this title 8.

(c) Nothing in this subsection (15.5):

(I) Prevents an insurance carrier or an employer from receiving a credit against permanent disability benefits for temporary disability benefits paid beyond the initial date of maximum medical improvement assigned by an authorized treating physician or the final date of maximum medical improvement established by any other means, whichever is later and to the extent that permanent disability benefits remain unpaid at the time of the filing of a final admission of liability; or

(II) Affects the power of the director or administrative law judges to determine overpayments and require repayment of overpayments pursuant to sections 8-42-113.5 and 8-43-207 (1)(q)."

Claimant argued the recent amendment to the overpayment statute should apply in this case, as it was evidence of the Colorado Legislatures' intent with regard to overpayments. In this regard, the ALJ reviewed the text of the amendment to the statute governing overpayments, which changed the definition of what constituted an overpayment. By its terms, the statute was effective January 1, 2022.[7] There was nothing in the text and no authority was presented by Claimant that the Colorado Legislature intended this amendment to apply retroactively to pending cases.

[7] Exhibit 1.

Accordingly, the ALJ concluded that Respondent had the right to recoup the overpayment which occurred in this case in 2020 and the Order will specify the terms by which Claimant is to repay the overpayment.

ORDER

It is therefore ordered:

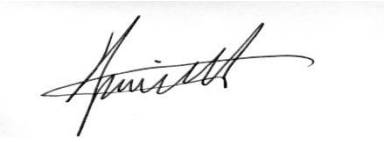
1. Respondent's claim for repayment of the overpayment is not barred by the statute of limitations.

2. Claimant shall pay $225.00 per month to Respondent repay the overpayment.

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

DATED: September 16, 2022

STATE of COLORADO



Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that he sustained a work related injury to his right knee on September 22, 2021.

II. If Claimant established that he suffered a compensable right knee injury, whether he also established, that he is entitled to all reasonable, necessary and related medical care to cure and relieve him of the effects of his compensable right knee injury, including but not limited to the medial meniscus repair by Dr. Doner on June 6, 2022.

III. If Claimant established that he suffered a compensable right knee injury, whether he also established, that he is entitled to Temporary Disability Benefits beginning December 4, 2021 and ending on August 1, 2022, when he returned to work.

PRELIMINARY MATTERS

1. Respondents' motion to add witness John Toupal was granted since Claimant did not file an objection to the motion.

2. Respondents' motion for sanctions for failure to adequately respond to interrogatories was denied. The ALJ finds that the Claimant's second supplemental Answers to Interrogatories are sufficient to provide Respondents with information to adequately prepare for hearing. (Resp. Exhibit T, p. 205). To the extent that Respondents object to any specific testimony from Claimant, Respondents were permitted to assert a specific objection at the time of the specific testimony and the objection would be ruled upon at that time.

FINDINGS OF FACT

Based upon the evidence presented, including medical records entered into evidence, the ALJ enters the following findings of fact:

1. Claimant is employed as a delivery driver. Prior to his injury, he had worked for the employer position for 10 years. The first five years he worked in a job preloading packages. For the second 5 years, he worked in his current job of delivery driver. His job requires him to make 200 to 400 deliveries per day with weights varying from 1 pound to 200 pounds. At the time of the injury, he had no prior problems with his right knee.

2. On September 22, 2021 Claimant had completed a delivery to Loaf and Jug and Indiana and Lake Avenue and was walking back to his truck across a parking

lot and he felt a pop in his right knee which he described as “a rubber band on the top of his knee snapped and popped over to the side”.

3. Claimant had sharp pain at first which then became mild limping. He stopped at a pharmacy and bought aspirin and a knee brace.

4. After purchasing the aspirin and knee brace, He reported the injury to his supervisor, Mr. B[Redacted] by telephone at approximately 1:00 p.m. He finished his shift. That evening, after his shift, he took the knee brace off and his knee was very swollen.

5. The injury occurred on a Wednesday and he took the next two days off since the swelling did not go down. He was referred to Concentra on Monday. When he was seen by Nurse Practitioner, Brenden Madrid, his knee was painful and swollen.

6. Nurse Practitioner Brenden Madrid took a history that “while he was walking across a parking lot he felt a pop followed by pain to the right knee. He states it feels like a rubber band being stretched over his right knee and rolled over the knee cap. Aggravated with walking and squatting. He states his right knee swells. Feels weak.” Mr. Madrid’s assessment was right knee strain. (Clamant’s Exhibit 4, p. 16).

7. Mr. Madrid’s treatment plan included diclofenac gel; Medrol pack; MRI of the right knee; physical therapy; and x-rays of the right knee. His restrictions included lifting up to 10 pounds. He was limited to office or clerical work only with no kneeling or squatting and no standing or walking over 10 minutes per hour. According to Claimant the employer was able to accommodate these restrictions. He returned to work restricted duty beginning the Tuesday after his first visit with Mr. Madrid. The Claimant began physical therapy on October 18, 2021.

8. The x-rays showed no acute fracture. The MRI, taken on October 28, 2021 showed a tear of the posterior horn of the medial meniscus and MCL and ACL strains. (Claimant’s Exhibit 6, p. 122). It also showed patellofemoral degenerative changes. After review of the MRI results, Dr. Trifilo at Concentra referred Claimant to an Orthopedic physician for an evaluation.

9. On December 4, 2021, the Employer could no longer accommodate the restrictions.

10. Claimant was seen by Dr. Doner at Concentra on December 14, 2021 for the orthopedic consultation. After consideration of further conservative care, including an injection, Dr. Doner recommended right knee arthroscopy with partial medial menisectomy.

11. Dr. Doner stated in his causation analysis: “In reviewing the patient’s history and medical records and examination today, it appears that the patient did sustain an injury to right knee arising out of and caused by the industrial exposure of 09/22/2021/09/02/2021”. (Claimant’s Ex. 5, p. 94).

The Independent Medical Examination of Dr. Aschberger

12. Dr. John Aschberger performed an independent medical examination (IME) of Claimant on July 8, 2022 at Respondents’ request. Dr. Aschberger took a history that the Claimant had the onset of right knee pain while walking across a parking lot. He described a “rubber band’ sensation snapping across the anterior aspect of the knee. He did not misstep, step on a rock, a hole, etc. He noted that surgery was recommended and denied by workers compensation. Dr. Aschberger noted that Claimant had knee surgery on June 6, 2022, but that he did not have a copy of the surgical report. With respect to past medical history, he states: “Noncontributory. He denies any previous knee injury or issues.” (Resp. Ex. H, p. 20).

13. Dr. Aschberger opined that: “Review of the history and his report today indicates no work-related traumatic event precipitating the abnormalities. [Claimant] reports no prior symptomatology. However, given the extent of the findings on the MRI scan, including a meniscal tear and ligamental sprain, there was likely an underlying preexisting issue.” (Resp. Ex. H, p. 21).

14. Dr. Doner performed the knee surgery on June 6, 2022. The surgery was successful. Dr. Doner released Claimant to full duty on August 1, 2022 and Claimant returned to work at that time.

15. The ALJ credits the opinions of Dr. Doner and Claimant’s testimony to find that he has established, by a preponderance of the evidence, that he sustained a compensable injury to his right knee on September 22, 2021. Although there is a reference to September 2, 2021 in the same report, it appears that Dr. Doner is referring to the incident on September 22, 2021. The ALJ does not find the conclusory opinions of Dr. Aschberger to be persuasive in light of the fact that Claimant had no preexisting problems with his right knee and was able to perform a fairly strenuous job before September 22, 2021.

CONCLUSIONS OF LAW

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

Generally

A. The purpose of the Workers’ Compensation Act of Colorado, §§ 8-40-101,

et seq., C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979).

B. Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

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

Compensability

D. To recover benefits under the Worker's Compensation Act, the Claimant's injury must have occurred "in the course of" and "arise out of" employment. *See* § 8-41-301, C.R.S.*; Horodyskyj v. Karanian* 32 P.3d 470 (Colo. 2001). The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements to establish compensability. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). Thus, an injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during

an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). In this case, there is little question that Claimant's alleged injuries occurred within the time and place limits of his employment relationship with Employer, i.e. after delivering a package to a Loaf and Jug and walking back to his delivery truck. While there is substantial evidence to support a conclusion that Claimant's alleged injury occurred in the course of his employment, the question of whether the injury "arose out of" his employment must be resolved before the injury can be deemed compensable.

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

F. The fact that Claimant may have experienced an onset of pain while performing job duties does not mean that he sustained a work-related injury or occupational disease. Indeed, an incident which merely elicits pain symptoms without a causal connection to the industrial activities does not compel a finding that the claim is compensable. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Parra v. Ideal Concrete,* W.C. No. 3-963-659 and 4-179-455 (April 8, 1988)*; Barba v. RE1J School District,* W.C. No. 3-038-941 (June 28, 1991); *Hoffman v. Climax Molybdenum Company,* W.C. No. 3-850-024 (December 14, 1989). In this case, the medical record evidence is devoid of any indication that Claimant's right knee was symptomatic or required treatment before September 22, 2021. His knee became symptomatic while he was returning to his delivery van when he felt a pop in his knee.
The evidence presented supports a conclusion that Claimant reported the injury to his supervisor, by phone after the incident. He then purchased aspirin and a knee brace while he continued his delivery route. He sought care with Concentra the Monday following the incident. Prior to his injury, Claimant was able to perform his physically demanding job without difficulty.

G. In concluding that Claimant has proven, by a preponderance of the evidence, that he suffered a compensable work injury, the ALJ finds the opinion of the Industrial Claim Appeals Panel in *Sharon Bastian v. Canon Lodge Care Center*, W.C. No. 4-546-889 (August 27, 2003) instructive. In *Bastian*, the claimant, a CNA was on an

authorized lunch break when she injured her left knee. Claimant was returning to her employer's building with the intention of resuming her duties when she "stepped up the step at the door to the facility", heard a pop in her left knee and felt severe pain. She did not "slip, fall, or trip." Ms. Bastian was diagnosed with a meniscus tear and "incidental arthritis." The claim was found compensable. On appeal, the respondents contended that the ALJ erred, in part, on the grounds that the claimant was compelled to prove that her knee injury resulted from a "special hazard" of employment. Relying on their decision in *Fisher v. Mountain States Ford Truck Sales*, W.C. No. 4-304-126 (July 29, 1997), (rev'd, No. 97CA1439 (Colo. App. Feb. 12, 1998)(not selected for publication), the Panel concluded that there was no need for claimant to establish the step constituted a "special hazard" as claimant "did not allege, and the ALJ did not find, that the knee injury was "precipitated" by the claimants preexisting arthritis." The same is true of the instant case.

H. Analogous to the mechanism of injury asserted in *Bastian* and *Fisher*, *supra* the mechanism of injury claimed to have caused injury in this case arose from activities that, per Dr. Aschberger opined that do not constitute a work injury. Claimant is not required to prove the occurrence of a dramatic event to prove a compensable injury. *Martin Marietta Corp. v. Faulk,* 158 Colo. 441, 407 P.2d 348 (1965). Contrary to Dr. Aschberger's opinions, the persuasive evidence supports a conclusion that Claimant either suffered an acute tearing of the right medial meniscus or an aggravation of a previously asymptomatic pre-existing condition. While the mechanism of injury in this case is unusual, the ALJ is convinced that a logical connection exists between Claimant's stepping/walking at work, his right knee symptoms and his need for treatment. Consequently, the claimed injury is compensable.

Medical Benefits

I. Once a claimant has established the compensable nature of his/her work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable, necessary, and related medical care to cure and relieve the effects of the work injury. *Section 8-42-101, C.R.S.*; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). However, Claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949); *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970*);* § 8-41-301(1)(c), C.R.S. Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability was caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those which flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, *supra*.

J. Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003). The question of whether a particular medical treatment is reasonably necessary to cure and relieve a claimant from the effects of the injury is a question of fact. *City & County of Denver v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). In this case, the evidence demonstrates that Claimant's medical care, as provided by Dr. Doner and Concentra was reasonable, necessary and related to Claimant's September 22, 2021 injury. The medical care provided by Dr. Doner, including surgery was necessary to treat Claimant from the acute effects of his injury. In any event, at the hearing, Respondents conceded that the surgery was reasonable and necessary, but disputed whether the injury was compensable.

ORDER

It is therefore ordered that:

1. Claimant has established, by a preponderance of the evidence, that he sustained a work related injury to his right knee on September 22, 2021.

2. Respondents shall pay for all medical expenses, pursuant to the Workers' Compensation medical benefits fee schedule, to cure and relieve Claimant from the effects of his right knee injury including, but not limited to, the arthroscopic surgery performed by Dr. Doner.

3. Claimant is entitled to Temporary Disability Benefits for the time period of December 4, 2021 through August 1, 2022.

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

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

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

DATED: September 20, 2022

/s/ Michael A. Perales

Michael A. Perales
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-172-453-001

ISSUES

I. Whether the surgery recommended by Dr. Bazaz is reasonably necessary to cure and relieve Claimant from the effects of his April 7, 2021, work injury.

II. Whether Claimant is entitled to temporary total disability (TTD) benefits from April 8, 2021, to May 2, 2021.

III. Claimant's average weekly wage (AWW).

IV. Whether Respondents are liable for the medical treatment Claimant received at the Medical Center of Aurora – emergency department – on April 7, 2021.

FINDINGS OF FACT

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

Claimant Sustained a Work-Related Injury to his Right Upper Extremity

1. Claimant was employed with Respondent-employer as an install apprentice. (Tr. p, 16:18-20). Claimant's job required a lot of heavy lifting and the need to get into tight places, such as under houses and in attics. (Tr. P.17: 5-13). Thus, Claimant's work required him to use both of his upper extremities to perform his regular job duties. On April 7, 2021, Claimant was installing an air handler in an attic when he fell eight feet through the ceiling to the floor. (Tr. p, 18:12-19; p. 19:11-12). As he fell, his right arm caught on a wooden truss in the ceiling. *Id*. Following the fall his right shoulder burned, he had pain shooting down his right arm, and his right hand fingers were swollen. (Tr. p, 20:1-6).
2. Immediately after the accident, Claimant's boss took him to the emergency department at the Medical Center of Aurora. (Tr. p, 20:20-25; 21:1).
3. Upon presentation to the emergency department, Claimant reported pain in his right upper extremity, which included his hand, wrist, arm, and shoulder. (Rs' Ex. K, p. 92). X-rays of his hand, wrist, and shoulder were negative for acute bony abnormalities or fractures. *Id*. at 96-98. He was given a sling and discharged without formal work restrictions. (Tr. p, 21:8-14). Claimant was, however, directed to follow up with an occupational medical provider for potential work restrictions. (C's Ex. 6, p. 35.) Due to his injury, which resulted in ongoing pain and the need to wear a sling, Claimant was precluded from performing his regular job duties.
4. Based on the accident – in which Claimant fell and had the immediate development of symptoms - the treatment at the emergency room was reasonably necessary to cure and relieve – treat - Claimant from the effects of his work injury. The treatment is also deemed

authorized since it was an emergency and Claimant was driven to the emergency room by his supervisor.

5. Claimant testified that at the time of the injury, he was paid twenty dollars per hour while working for Employer and worked approximately forty to fifty hours per week. (Tr. p, 17:15-25; 18:1-5). He also testified that he was given a raise from eighteen dollars per week to twenty dollars per week around March 15, 2021. For overtime, he was paid time and a half. (Tr. p, 18:6-8). Claimant was terminated from Respondent-employer on April 7, 2021 – the day of the accident. (Tr. p, 22:9-14). Claimant's testimony regarding his hourly wage, raise, and termination is consistent with the wage records. Thus, at the time of the injury, Claimant was earning twenty dollars per hour and time and half for overtime.

6. Respondent-employer wage records evidence the following:

Pay period:	Regular Hours	Regular Rate	Overtime Hours	Overtime Rate	Gross Earnings
2/1/2021- 2/7/2021	40.5	$18.00	.5	$27.00	$729.00
2/8/2021-2/14/2021	40	$18.00	11	$27.00	$1,017.00
2/15/2021-2/21/2021	40	$18.00	11	$27.00	$1,017.00
2/22/2021-2/28/2021	40	$18.00			$720.00
3/1/2021-3/7/2021	40	$18.00	5	$27.00	$855.00
3/8/2021-3/14/2021	35	$18.00			$630.00
3/15/2021-3/21/2021	35	$20.00			$700.00
3/22/2021-3/28/2021	40	$20.00	11	$30.00	$1,130.00
3/29/2021-4/4/2021	40	$20.00	12	$30.00	$1,160.00

(Rs' Ex. I).

7. Since Claimant was earning twenty dollars per hour on the date of injury, that is the hourly rate that will be used to calculate Claimant's AWW – including calculating his overtime. In calculating his AWW, the ALJ finds that the fairest method is to average the hours he worked over a 9 week period, but base his wages on twenty dollars per hour. From February 1, 2021, through April 4, 2021, nine weeks, Claimant worked 350 regular hours. At twenty dollars per hour, that would result in $7,000 in regular wages. During the same period, Claimant also worked 50.5 hours of overtime. That would result in $1,515 in overtime wages. Thus, at twenty dollars an hour, Claimant would have earned $8,515 over a nine-week period. Dividing $8,515 by nine weeks equals an AWW of $946.11. Therefore, Claimant's AWW is $946.11.

8. After being terminated the day of the accident, Employer did not provide Claimant a list of medical providers with whom to treat or direct Claimant to a medical provider for follow up care after being treated at the emergency room.

9. Claimant accepted a new job a few days after the work injury but could not begin to work until May 3, 2021, because his right shoulder was in a sling, and he could not physically

perform his job duties - due to his symptoms and physical limitations caused by his work accident - until he started working on May 3, 2021. (Tr. p, 28:9-11). Claimant has worked full time since May 3, 2021. (Tr. p, 27:20-25). As a result, Claimant's work injury precluded Claimant from performing his regular job duties from April 8, 2021, to May 2, 2021, and Claimant did not work during such period.

10. Respondents filed a medical only General Admission of Liability ("GAL") on June 14, 2021. (Rs' Ex. C, p. 5).

11. At hearing, Claimant credibly testified that he has pain in his right shoulder that shoots down into his arm and up toward his neck. (Tr. p, 25:24-25; 26:1-3). He also credibly testified that he has pain in his right chest area and cannot work above his head with his right arm for more than a few minutes without pain. *Id*.

12. About two or three weeks after the date of injury he received a medical bill from Medical Center of Aurora. (Tr. p, 22:18-23). Claimant testified that he was not aware of the bill being paid by Respondents. *Id*.

Claimant's Initial Treatment After Presenting to the Emergency Room

13. On June 28, 2021, Claimant presented to Dr. Williams at SCL Health. (Rs' Ex. L, p. 114). He reported dull and aching pain in his right shoulder that occurred several times per day and lasted minutes at a time. *Id*. at 115. Dr. Williams noted that Claimant had deferred his start date with his new employer by about three weeks and was currently working with self-imposed restrictions. *Id*. at 116. On physical examination, Dr. Williams noted mildly limited flexion, significantly limited abduction, mildly limited internal rotation, painful resisted empty can test and biceps testing, crepitus on motion, and non-tenderness over the clavicle. *Id*. Dr. Williams assigned restrictions of lifting, carrying, pushing, and pulling up to 30 pounds and no overhead reaching. *Id*. at 113. Thus, Claimant's injury continued to prevent him being able to perform his regular job duties, even if some of his restrictions were self-imposed.

14. Due to his ongoing shoulder and arm symptoms, Claimant underwent an MRI with contrast of the right shoulder on June 29, 2021. (Rs' Ex. O, p. 354). The MRI report dated July 1, 2021, demonstrated a small nondisplaced partial-thickness tear of the peripheral posterior inferior glenoid labrum at the 7:00 o'clock position with a 4 mm associated peripheral paralabral cyst. *Id*. The radiologist did not note any other findings regarding Claimant's labrum.

15. On July 6, 2021, Claimant reported pain that was aching and burning as well as numbness that occurred continuously for hours. (Rs' Ex. L, p. 121). Dr. Williams reviewed the MRI and assessed a right glenoid labral tear. *Id*. at 122. Dr. Williams opined that Claimant was likely not a surgical candidate. *Id*. But he did express concern over Claimant's ongoing pain complaints and requested an orthopedic consultation. *Id*. In the interim, Claimant was to begin physical therapy. *Id*.

16. On July 14, 2021, Claimant again reported pain that was aching and burning and numbness that occurred continuously. (Rs' Ex. L, p. 135). Dr. Williams noted that Claimant was working without difficulty with the assigned restrictions. *Id*. Claimant was to continue with physical therapy as planned, which Dr. Williams hoped he would respond well to, given the small nature of the labral tear. *Id*. at 136.

17. On July 14, 2021, Claimant presented to his first physical therapy appointment. (Rs' Ex. M, p. 247). He reported pain mostly in the anterior and posterior of his shoulder that sometimes radiated into the chest, with numbness into his fingers and with gripping. *Id*. at 248.

18. Physical therapy notes from July 26, 2021, document reports of continuing right shoulder pain and that his right arm not feeling right with tingling in the fingertips. (R's Ex. M, p. 257-258).

Dr. Ferrari's Orthopedic Assessment

19. On August 2, 2021, Claimant presented to Dr. Ferrari's office for an orthopedic evaluation of his shoulder and was evaluated by PA Belcher. (Rs' Ex. R, p. 377). Claimant reported aching, shooting, burning, cramping, and sharp pain in his right shoulder that occurred constantly. *Id*. He described constant pain, even at rest, that radiated to the right hand with numbness and tingling. *Id*. PA Belcher noted that the MRI showed normal articular cartilage, no cuff injury, no tearing, and no fracture or loose bodies. *Id*. at 378. PA Belcher also noted that the MRI showed no labral tearing – despite the MRI report documenting a labral tear. Dr. Ferrari, who appears to have just signed off on the evaluation and did not physically examine Claimant, opined that Claimant's right shoulder examination was normal and that Claimant's symptoms were consistent with a cervical spine issue and recommended an MRI of the cervical spine. *Id*. Therefore, he recommended an MRI of Claimant's cervical spine. *Id*.

Continued Medical Treatment

20. Physical therapy notes from August 9, 2021, document reports of numbness and tingling in the right four fingers and a new funky feeling in the ulnar side of the right palm. (Rs' Ex. M, p. 273-274). That same day, Claimant saw Dr. Williams and reported pain that was shooting, burning, aching, as well as numbness and weakness. (Rs' Ex. L, p. 143). On physical examination, Claimant displayed somewhat limited range of motion in the right extremity with pain, stiffness, and pulling pain with muscle spasm noted at the right upper trapezius muscle. *Id*. at 144. Dr. Williams opined that the mechanism of injury did not support cervical radiculopathy and based on Claimant's age there should be no underlying degenerative issues. *Id*. A diagnosis of traction neuropathy was discussed based on the fall and the arm injury having been the inciting event for Claimant's pain. *Id*. Dr. Williams recommended a cervical spine MRI and right upper extremity EMG. *Id*. Claimant was to continue with physical therapy. *Id*.

21. Physical therapy notes from August 16, 2021, document Claimant's primary and chief complaint was right shoulder pain but yet he also had numbness and tingling in his right fingers. (Rs' Ex. M, p. 283). That same day, Claimant saw Dr. Williams and reported pain that was aching in nature that occurred all the time. (Rs' Ex. L, p. 153). He reported that his symptoms were somewhat better but aggravated by activity. *Id*. at 154. Dr. Williams reviewed the cervical spine MRI and opined that it was essentially normal and showed no degenerative changes. *Id*. at 155. Dr. Williams concluded that if orthopedics did not find any mechanical issues with the shoulder, then Claimant should continue physical therapy. *Id*. Claimant's restrictions were modified to lifting, carrying, pushing, and pulling up to 40 pounds, with an allowance for overhead lifting. *Id*. at 153.

22. Physical therapy notes from August 24, 2021, document that Claimant was at work earlier in the day and his right hand started to swell. (Rs' Ex. M, p. 288).

23. Physical therapy notes from September 3, 2021, document continued numbness, tingling, and swelling in the shoulder into the right hand. (Rs' Ex. M, p. 294).

Diagnosis of Brachial Plexopathy

24. On September 1, 2021, Claimant presented to Dr. Miller of Colorado Rehabilitation & Occupational Medicine for the right upper extremity EMG. (Rs' Ex. P, p. 358). He reported right shoulder pain, diffuse, achy, worse with reaching overhead or leaning on the shoulder. *Id*. He also reported tingling in his right hand most prominent in the index to little finger and intermittent hand swelling. *Id*.

25. The EMG results were abnormal, with electrodiagnostic evidence most consistent with very mild right brachial plexopathy likely of the medial cord with the ulnar sensory innervation pathway. (Rs' Ex. P, p. 359). There were no needle EMG signs of acute or chronic denervation of the right upper extremity and no electrodiagnostic evidence of right median neuropathy, cervical radiculopathy, nor generalized polyneuropathy. *Id*. Dr. Miller opined that the prognosis was favorable with physical therapy, medications, and shoulder injections, such as a glenohumeral joint injection. *Id*.

Continued Medical Treatment

26. On September 7, 2021, Claimant reported pain that was aching and burning with throbbing and numbness. (Rs' Ex. L, p. 162). Dr. Williams reviewed the EMG results and recommended continued physical therapy and a trial of Gabapentin at 100 mg daily to titrate to 300 mg. *Id*. at 163. Dr. Williams opined that the brachial plexopathy should get better with time but may take nine to 12 months to completely resolve. *Id*. at 162.

27. On September 20, 2021, Claimant reported frustration with his progress. (Rs' Ex. L, p. 168). It was noted that brachial plexopathy injuries can be a slow and arduous recovery. *Id*. at 169. Dr. Williams referred Claimant for a second orthopedic opinion to help guide ongoing care. *Id*.

28. On September 30, 2021, Claimant reported pain that was aching and burning that occurred continuously with numbness and swelling. (Rs' Ex. L, p. 183). Claimant was not sure what caused the pain and noted that he experienced pain when sitting down or hanging out. *Id*. On physical examination the right shoulder had significant tenderness over the bicipital groove, limited range of motion in all planes, and most notably abduction resulted in catching around 90 degrees. *Id*. at 184. Claimant's ability to extend had worsened and he had pain and weakness with pronation. *Id*.

29. Physical therapy notes from October 7, 2021, document that Claimant experienced pain in his right shoulder as well as burning pain in his front right pec. (Rs' Ex. M, p. 325).

Dr. Bazaz's Evaluations and Surgical Recommendation

30. On November 12, 2021, Claimant presented to Dr. Bazaz for a second orthopedic opinion. (Rs' Ex. Q, p. 366). Claimant reported right sided shoulder pain. *Id*. He also reported loss of strength and right hand swelling. *Id*. Dr. Bazaz noted that Claimant "has had an EMG, which he states showed a minor issue, but it does not sound like it was anything too significant." *Id*. On physical examination Dr. Bazaz noted positive impingement findings, positive O'Brien's test, and reasonable cuff strength. *Id*. at 367. Dr. Bazaz determined that the MRI showed no significant labral tearing and no partial-thickness or full-thickness rotator cuff pathology, but did show irregularity of the posterior inferior labrum with a very small paralabral cyst and potential superior labral pathology. *Id*. at 367. Dr. Bazaz diagnosed a right shoulder contusion and opined that the MRI showed evidence of a posterior labral tear and potentially a superior labral tear, but it was not 100% convincing. *Id*. Dr. Bazaz stated that Claimant's symptoms were not only at his shoulder, but also down his arm and into his hand. Dr. Bazaz could not explain the relation of the pain and swelling in Claimant's hand to the torn labrum. *Id*. But he did not rule out the torn labrum as the cause of some of Claimant's symptoms. Therefore, Dr. Bazaz recommended a glenohumeral joint injection to determine what percentage of Claimant's symptoms were coming from the glenohumeral joint to gain confidence that the labral pathology was the cause of at least some of Claimant's symptoms. *Id*.

31. On January 10, 2022, Claimant returned to Dr. Bazaz with reports of right shoulder discomfort and distal radiation. (Rs' Ex. Q, p. 373). Dr. Bazaz noted that "the EMG was negative." *Id*. Claimant underwent an ultrasound guided injection into the glenohumeral joint on the right side for evaluation of the posterior labral tear. *Id*. Dr. Bazaz commented that it was necessary to define what the posterior labral tear meant in real life because it was seen on the MRI, but Claimant's symptoms were fairly diffuse and he needed to understand if the diffuse symptoms related to the labral tear. *Id*.

32. On January 28, 2022, Claimant returned to Dr. Bazaz with reports of right shoulder pain with distal radiation and occasional paresthesia into the upper extremities. (Rs' Ex. Q, p. 374). Dr. Bazaz noted that the majority of Claimant's pain was at the shoulder. *Id*. On physical examination, Dr. Bazaz recorded intact internal and external rotation strength, no significant pain at supraspinatus, positive impingement findings, and positive O'Brien's test. *Id*. Dr. Bazaz noted that "it sounds like an EMG was done and that was negative." *Id*. Claimant reported a few hours of relief from the glenohumeral joint injection, but it did not give lasting relief to the right shoulder. *Id*. It was noted that the injection made Claimant's symptoms a little worse. *Id*. Dr. Bazaz opined that there was some suggestion of labral pathology on the MRI but it was not 100% convincing. *Id*. Dr. Bazaz opined that the labral pathology could be causing Claimant's shoulder pain and difficulty with overhead function, but he could not say that it was causing the symptoms beyond the elbow. *Id*. Dr. Bazaz opined that the labral pathology would not be causing the paresthesias that Claimant intermittently experienced in his upper extremity. *Id*. Dr. Bazaz stated that he was hoping to find what percentage of Claimant's symptoms were coming from the glenohumeral joint/labrum with the injection, but based on the results of the injection, he still had some questions about the clinical significance of the labrum. *Id.* at 375. In the end, Dr. Bazaz could not determine the extent of Claimant's symptoms that were being caused by the torn labrum. Therefore, he concluded that the best surgical

option to address Claimant's shoulder symptoms was to proceed with a *diagnostic* arthroscopy to evaluate Claimant's labrum and other structures of his shoulder – and determine the type of repairs necessary during the operation (emphasis added). But, Dr. Bazaz made it clear that he could not definitively state that the surgery would lead to discovery of significant pathology or the pathology that was causing all of Claimant's symptoms. *Id*. Dr. Bazaz stated:

> At this time, I think our options are pretty much leaving the situation as is, use intermittent over-the-counter pain medicine, do more physical therapy which he has done since July of last year, or consider surgery. With regard to his surgery, I cannot tell him that I know for a fact that we are going to find a significant pathology/the pathology that is causing all of his symptoms. At this time, he feels that before he just leaves the situation as is he wants to proceed with intervention. Therefore, we will proceed with right shoulder diagnostic arthroscopy with close evaluation of the superior labrum and posterior labrum and proceed with labral repairs as deemed appropriate based on the intraoperative findings. We will closely look at his subacromial space and, if there is CA ligament roughening, proceed with subacromial decompression. Obviously, the pathology in the shoulder is going to be what exists in real life and, hopefully, by addressing the pathology, we can improve his clinical situation. I will proceed with the assumption that he will be a labral repair.

Id.

Therefore, Dr. Bazaz determined that a diagnostic arthroscopic surgery was reasonable and necessary to determine the extent of Claimant's shoulder injury and to determine further treatment – repairs needed – during the surgery. After determining that surgery was appropriate, Dr. Bazaz sought authorization for a "Right shoulder scope w/ slap repair, posterior labral repair DME needed: Cooling Unit, Sling." (C's Ex. 30, p. 287.) The request for authorization was denied.

Respondents' Medical Record Review by Dr. Farber

33. Dr. Farber, an expert in orthopedic sports medicine with a focus on shoulder, knee, and elbow conditions conducted a Rule 16 medical records review of Dr. Bazaz's surgical request and authored a report dated February 4, 2022. An addendum was submitted on July 9, 2022, after review of additional medical records - those pertaining to Dr. Ferrari's evaluation. Dr. Farber neither physically examined Claimant nor interviewed Claimant. Dr. Farber determined that Claimant sustained a right shoulder small partial-thickness linear tear of the posterior inferior labrum and right shoulder brachial plexopathy as diagnosed by the EMG. (Rs' Ex. J, p. 74). Dr. Farber testified that the labrum is like a clock face, 1:00 to 12:00 represents a 360-degree circumference, of which the tear at 7:00 only represents one-twelfth of the labral. (Tr. p, 35:17-22). Claimant has a very small partial-thickness tear with the associated ligaments intact. *Id*. Dr. Farber opined that

Claimant's subjective symptoms are more consistent with symptoms related to brachial plexopathy as opposed to a posterior labral tear that warranted surgical intervention. (Rs' Ex. J, p. 74).

34. Dr. Farber opined that Dr. Bazaz's surgical request is not reasonable, necessary, or related to the April 7, 2021 industrial injury for five reasons: 1) Claimant's subjective complaints are not consistent with symptomatic labral pathology; 2) There are no objective physical examination findings indicative of symptomatic posterior labral pathology to warrant surgical intervention; 3) The MRI findings are not significant enough to warrant surgical intervention in the form of a posterior labral repair and are not present to warrant a SLAP repair; 4) Claimant's response to the glenohumeral intra-articular injection is not suggestive of symptomatic posterior labral pathology that warrants surgical intervention; and 5) There is no indication for surgical intervention under the medical treatment guidelines. (Rs' Ex. J, p. 76-78).

35. First, as stated by Dr. Farber, patients with symptomatic posterior labral pathology typically report isolated posterior or deep-seated shoulder pain that is intermittent and associated with certain positions of the arm/shoulder. (Rs' Ex. J, p. 75). Patients may also report mechanical catching and/or a sense of instability with certain provocative maneuvers/positions. *Id*. At hearing, Dr. Farber testified that patients with symptomatic labral pathology should not have constant pain, numbness, tingling, or swelling. (Tr. p, 33:1-7). Because symptomatic labral pathology does not involve muscle, it should not affect grip strength. *Id*. Dr. Farber noted that Claimant's complaints of constant pain occurring continuously, radiating away from the shoulder and into the forearm, hand, and/or chest, swelling in the hand, paresthesias in the upper extremity, and diminished grip strength, but no apprehension, instability, or mechanical symptoms, is not consistent with symptomatic posterior labral pathology. *Id*.

36. Second, typical physical examination findings of patients with symptomatic posterior labral pathology include localized posterior joint line tenderness, reproducible mechanical symptoms with certain provocative maneuvers, and/or apprehension or laxity with posterior stability testing maneuvers. (Rs' Ex. J, p. 76). Dr. Farber testified that these tests consist of relocation test, posterior drawer test, the posterior load and shift test, and sulcus sign, all of which are designed to test for stability of the shoulder and to try and irritate the posterior labrum by specific provocative positions or maneuvers. (Tr. p, 33:11-16). Dr. Farber noted that despite seeing numerous medical providers, none of them administered physical examination tests specifically intended to assess for labral pathology and/or shoulder instability. (Rs' Ex. J, p. 76). Dr. Farber noted that patients with symptomatic labral pathology do not typically demonstrate stiffness, weakness, sensory deficits, or diffuse non-localizing tenderness to palpation. *Id*. That said, Claimant's documented physical examination findings showed limitations in abduction and forward flexion, tenderness over the long head of the biceps tendon, bicipital groove, infraspinatus, pectoralis major, first rib, and upper trapezius, stiffness and muscle spasms in the upper trapezius, digital numbness associated with shoulder abduction, tenderness over the right scalene muscles, limited shoulder strength, weakness with grip strength testing, and pain and weakness with wrist forearm pronation. *Id*. at 77. None of the aforementioned findings are indicative of symptomatic posterior labral pathology that

would warrant surgical intervention, nor do any of the objective physical examination findings indicate the presence of symptomatic posterior labral pathology. *Id*.

37. Third, surgical intervention is not warranted for partial-thickness posterior labral pathology. (Rs' Ex. J, p. 77). Dr. Farber noted that surgical intervention is warranted for displaced labral pathology and/or full thickness labral tears in conjunction with the presence of correlating clinical symptoms and objective physical examination findings. *Id*. Dr. Farber testified that a small tear like Claimant's is not detached or displaced and is only a partial-thickness, which has excellent healing potential. (Tr. p, 36:6-13). He noted that unless patients report instability or reproducible clicking or catching, or have an isolated pain with certain provocative maneuvers to irritate that portion of the labrum, surgery is of no benefit. *Id*.

38. Fourth, Claimant's response to the glenohumeral intra-articular injection performed on January 10, 2022, is not suggestive of symptomatic posterior labral pathology that warrants surgical intervention. (Rs' Ex. J, p. 78). Dr. Farber testified that a patient with isolated labral pathology would show dramatic improvement of pain, the duration of which would be anywhere from six to eight hours following a local anesthetic or several weeks to months following a steroid. (Tr. p, 34:16-22). Dr. Farber testified an hour of pain relief or worsening of symptoms, as in Claimant's case, is not expected. *Id*. Dr. Farber highlighted that Claimant reported receiving limited benefit to his shoulder for a few hours and that Dr. Bazaz commented that the injection made Claimant's symptoms worse, neither of which are a positive diagnostic response that substantiates the need for surgical intervention to address intra-articular pathology. (Rs' Ex. J, p. 78). Dr. Farber also drew attention to the fact that after reviewing Claimant's response to the diagnostic injection, Dr. Bazaz opined that there was still question about the clinical significance of the labrum. *Id*.

39. Fifth, and lastly, Dr. Farber noted that although the Code of Colorado Regulations Department of Labor and Employment Division of Workers´ Compensation Rule 17, Exhibit 4, Shoulder Injury Medical Treatment Guidelines do not specifically address surgical intervention for posterior labral pathology, the guidelines do discuss the need for surgery to address recurrent shoulder instability episodes and SLAP tears. (Rs' Ex. J, p. 78). In regard to the surgical aspect of the SLAP tear proffered by Dr. Bazaz, Dr. Farber highlighted that the reading radiologist made no mention of a SLAP tear on the MRI. (Tr. p, 36:14-17). Dr. Farber opined that there was no evidence of a SLAP tear on the MRI and no documentation of any shoulder instability episodes on the date of injury or subsequent thereto. (Rs' Ex. J, p. 79). Therefore, surgery for a SLAP tear is not indicated. *Id*.

40. Dr. Farber determined that, from a general orthopedic standpoint as it relates to the right shoulder, Claimant is at MMI. (Rs' Ex. J, p. 88). Dr. Farber concluded that Claimant's documented clinical symptoms, physical exam findings, and response to the intra-articular glenohumeral injection strongly argue against the presence of intra-articular shoulder pathology that is causally related to the industrial injury and responsible for his documented subjective symptoms. *Id*.

41. Dr. Farber testified that he was not sure that Dr. Bazaz was aware of the EMG findings or if he had seen the report, but Claimant's testimony of weakness lifting over head was

further evidence of a nerve injury as compared to a labral injury because the labral is not a muscle and does not have an effect on individual strength. (Tr, p. 37:19-24;38:3-9). The EMG evidence of a medial cord brachial plexopathy explain Claimant's subjective symptoms, which would not be improved with a shoulder arthroscopy. *Id*. Dr. Farber testified that Claimant had undergone 17 sessions of physical therapy which is sufficient for a labral injury, but is not sufficient for a brachial plexus injury. (Tr, p. 44:25;45:1-6). Dr. Farber testified that Claimant has not undergone physical therapy focused on brachial plexus. (Tr, p. 44:17-22). Dr. Farber testified that brachial plexus injuries can take up to a year to resolve and usually require long-term therapy and injections. (Tr, p. 45:9-14). While it is theoretically possible to have a brachial plexus injury and a symptomatic labral tear, Dr. Farber testified that he does not believe that is occurring in Claimant's situation. (Tr, p. 50:6-10). Dr. Farber opined that Claimant may require further treatment from a neurologist, physiatrist, and/or a neurosurgeon, but not an orthopedic surgeon. (Rs' Ex. J, p. 89).

42. The ALJ has weighed the opinions of Dr. Bazaz and Dr. Farber. In this case, Dr. Bazaz has treated Claimant. This includes meeting with Claimant, discussing with Claimant his symptoms and physically examining Claimant. During his treatment and evaluation of Claimant, he has tried to define the pain generator regarding Claimant's shoulder pain and symptoms in his arm. Dr. Bazaz is of the opinion that while Claimant's presentation might not be the classic presentation for a labral injury – a diagnostic arthroscopy is reasonably necessary to define the extent of Claimant's injury – and determine future treatment – in order to reduce Claimant's pain and improve his function. The ALJ is aware that Dr. Bazaz's reports are somewhat inconsistent as to whether he is aware that the EMG showed some findings suggestive of a brachial plexus injury. But, the ALJ finds that based on the facts and circumstances of this case, Dr. Bazaz thinks that some of Claimant's symptoms are related to his shoulder joint – including the labrum – and that the EMG results would address Claimant's other symptoms in his arm – which might be from a separate and distinct condition. The ALJ therefore does not find Dr. Bazaz's comments regarding the EMG to be fatal to his opinion as to whether Claimant's need for an arthroscopic surgery to be reasonably necessary to define the extent of Claimant's work injury and need for treatment to cure and relieve Claimant from the effects of his work injury. Overall, and based on the totality of the evidence, the ALJ finds Dr. Bazaz's opinion to be credible and persuasive as to the need for the diagnostic arthroscopic surgery -with repairs to be made as deemed reasonably necessary during the surgery.

43. In this case, the ALJ has also considered the opinion of Dr. Farber. The ALJ finds Dr. Farber's opinion in his reports and testimony to be clear, concise, and very well-reasoned. As set forth above, Dr. Farber has not only concluded that the arthroscopic surgery is not reasonably necessary, but he has also articulated the basis for his opinion in great detail. On the other hand, Dr. Farber has not obtained a detailed history from Claimant and has not physically evaluated Claimant. Moreover, he has not focused on the diagnostic value of the surgery.

44. In weighing the evidence, this a very close case. But, in the end, and based on the totality of the evidence, the ALJ finds Dr. Bazaz's opinion and recommendation for surgery to be more persuasive than the opinion provided by Dr. Farber. The ALJ finds Dr. Bazaz's opinion to be more persuasive than Dr. Farber's because Claimant still has shoulder pain

and limited function of his right shoulder – combined with symptoms that appear to also be consistent with a brachial plexus injury. Thus, performing surgery to define the extent of Claimant's shoulder injury with the goal of finding shoulder pathology that can be treated during surgery to improve Claimant's shoulder pain and function is reasonable and necessary to cure and relieve - treat - Claimant from the effects of his work injury.

45. The ALJ has also considered the Colorado Medical Treatment Guidelines. The ALJ, however, does not find them to be persuasive based on the facts of this case because as stated by Dr. Farber, the Guidelines do not specifically address surgical intervention for posterior labral pathology as found on Claimant's MRI.

46. As a result, the diagnostic surgery recommended by Dr. Bazaz, which he described as a right shoulder scope with slap repair, a posterior labral repair, with the associated durable medical equipment – which consisted of a cooling unit and a sling – is found to be reasonably necessary to cure and relieve Claimant from the effects of his work injury, i.e., related.

CONCLUSIONS OF LAW

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

General Provisions

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

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

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

P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. **Whether the surgery recommended by Dr. Bazaz is reasonably necessary to cure and relieve Claimant from the effects of his April 7, 2021, work injury.**

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. Moreover, medical "treatment" encompasses both diagnostic and curative medical procedures. *See Merriman v. Industrial Commission,* 120 Colo. 400, 210 P.2d 448 (1949) (exploratory surgery held compensable even where it revealed non-industrial condition); *Public Service Co v. Industrial Claim Appeals Office,* 979 P.2d 584 (Colo. App. 1999) ("The record must distinctly reflect the medical necessity of any such treatment and any ancillary service, care or treatment as designed to cure or relieve the effects of such industrial injury."); *Villela v. Excel Corp.,* W.C. No. 4-400-281 (ICAO February 1, 2001) (reasonable diagnostic procedures are a prerequisite to MMI if they have reasonable prospect for defining claimant's condition and suggesting further treatment). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

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

In this case, Claimant suffered a compensable injury when he injured his right shoulder on April 7, 2021. Since the date of injury, Claimant has consistently complained of pain and symptoms in his right shoulder as well as symptoms that go down his arm and into his hand.

Since his injury, Claimant has been seen by a number of physicians in order to define the extent of his injury and treat his injury in order to relieve Claimant's symptoms. The treating providers have included Dr. Williams, PA Belcher, Dr. Ferrari, and Dr. Bazaz. The treatment and diagnostic procedures have included, physical therapy, a shoulder injection, an EMG, and two MRIs. Claimant has also been evaluated by an independent

medical examiner, Dr. Farber, to determine the cause of Claimant's symptoms as well as the extent of future treatment.

Based on the evidence presented at hearing, Claimant is suffering from a shoulder injury, which includes at least a labral tear or tears, as well as a brachial plexus injury. This finding is supported by the fact that Claimant has symptoms and/or MRI and EMG findings that are consistent with a torn labrum as well as a brachial plexus injury. The problem, however, is that Claimant's shoulder symptoms – and his response to the injection – do not definitively confirm that his shoulder symptoms are due to his torn labrum. This is borne out by Dr. Bazaz's reports and recommendation for a diagnostic arthroscopic surgery to determine the extent of Claimant's shoulder injury and the cause of his pain and dysfunction - and to repair any damaged structures found during the surgery.

The ALJ finds and concludes that Dr. Bazaz's methodology for evaluating Claimant's condition and attempt to definitively find the pain generator in his shoulder – before recommending surgery - demonstrates a thorough assessment of Claimant's condition and the resulting recommendation for surgery. As found above, the ALJ finds Dr. Bazaz's opinion that the surgery is reasonably necessary to attempt to cure and relieve Claimant from the effects of his injury is found to be credible and persuasive. This is based upon the fact that Dr. Bazaz has physically evaluated Claimant in person, has been able to get a full history regarding his symptoms and failure to improve after undergoing physical therapy and an injection, and that Claimant's shoulder symptoms have not improved. Dr. Bazaz's opinion is also found credible and persuasive based on his statement that the surgery may not resolve all of Claimant's symptoms – thus demonstrating he is aware that Claimant might have a second condition that is causing some of Claimant's symptoms and functional impairment.

As stated above, the ALJ has also considered the opinions of Dr. Farber as well as the Colorado Medical Treatment Guidelines. As found, Dr. Farber's reports and testimony are clear, concise, well supported and persuasive. But, for the reasons set forth above, the ALJ has credited and found Dr. Bazaz's reports and recommendation for surgery to be more persuasive based on the totality of the evidence.

As a result, the ALJ finds and concludes that Claimant has proven by a preponderance of the evidence that the diagnostic shoulder surgery recommended by Dr. Bazaz – with repairs as needed - is reasonably necessary to cure and relieve Claimant from the effects of his work injury, i.e., related.

II. **Whether Claimant is entitled to temporary total disability benefits from April 8, 2021, to May 2, 2021.**

To prove entitlement to TTD benefits, Claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain

TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*.

The existence of disability presents a question of fact for the ALJ. There is no requirement that the claimant produce evidence of medical restrictions imposed by an ATP, or by any other physician. Rather, lay evidence alone may be sufficient to establish disability. *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997).

As found, Claimant suffered an injury to his right shoulder on April 7, 2021. Claimant's job required him to use both upper extremities. Immediately after the injury, Claimant was taken to the emergency room with pain in his right shoulder and arm. Based on his injury and symptoms, Claimant was prescribed a sling for his right arm. Due to being in a sling, and ongoing pain, Claimant was unable to perform his regular job duties as of the date of injury. Claimant was able to find employment after his work injury. But, due to his ongoing symptoms and need to wear a sling, Claimant was unable to start his new job and work until May 3, 2021. Moreover, Claimant did not work from April 8th through May 2nd of 2021.

As a result, the ALJ finds and concludes that Claimant established by a preponderance of the evidence that his work injury caused his disability and that he could not perform his regular job duties from April 8, 2021, through May 2, 2021, and did not work during such time. Therefore, Claimant established that he is entitled to TTD from April 8, 2021, through May 2, 2021.

III. **Claimant's average weekly wage.**

Section 8-42-102(2), C.R.S., requires the ALJ to base the claimant's AWW on his earnings at the time of injury. However, under certain circumstances the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Avalanche Industries, Inc. v. Clark,* 198 P.3d 589 (Colo. 2008); *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Specifically, § 8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine Claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp., supra.*

In this case, the ALJ finds and concludes that arriving at a fair approximation of Claimant's wage loss and diminished earning capacity can best be determined by averaging the number of hours Claimant worked each week in the nine-week period preceding his injury. The ALJ also finds and concludes that in arriving at a fair approximation of Claimant's wage, his AWW should be based on the hourly rate he was being paid at the time of the accident – which is twenty dollars.

The ALJ finds and concludes that on the date of injury, Claimant was earning twenty dollars per hour for up to forty hours per week and thirty dollars per hour for overtime.

The ALJ also finds and concludes that From February 1, 2021, through April 4, 2021, nine weeks, Claimant worked 350 regular hours. At twenty dollars per hour, that would result in $7,000 in regular wages over the nine-week period. During the same period, Claimant also worked 50.5 hours of overtime. At thirty dollars per hour, that would result in $1,515 in overtime wages. Thus, at twenty dollars an hour for regular time, and thirty dollars an hour for overtime, Claimant would have earned $8,515 over a nine-week period. Dividing $8,515 by nine weeks equals an $946.11. Therefore, the ALJ finds and concludes that Claimant's AWW is $946.11.

IV. **Whether Respondents are liable for the medical treatment Claimant received at the Medical Center of Aurora – emergency department – on April 7, 2021.**

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

As found, Claimant suffered a compensable injury on April 7, 2021, when he went through a ceiling and fell approximately eight feet. Immediately after the accident, Claimant developed pain in his right shoulder and upper extremity and was taken by his boss to the emergency room at the Medical Center of Aurora. Upon presentation to the emergency department, Claimant reported pain in his right extremity, which included his hand, wrist, arm, and shoulder. Based on Claimant's injury, Claimant was evaluated and treated on an emergent basis. The evaluation and treatment included X-rays of Claimant's right hand, wrist, and shoulder. Although the X-rays were negative for acute bony abnormalities or fractures, Claimant was given a sling and directed to follow up with an occupational physician.

As a result, the ALJ finds and concludes that Claimant established by a preponderance of the evidence that the emergent medical treatment he received at the emergency room at the Medical Center of Aurora on the day of April 7, 2021, was reasonably necessary to cure and relieve - treat - Claimant from the effects of his work injury. Moreover, the ALJ also finds that such treatment was authorized since Claimant was taken to the emergency room by his boss and it was an emergency. Thus, Respondents are responsible for the treatment provided on April 7, 2021, at the emergency room visit.

ORDER

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

1. Respondents shall pay for the surgery, and DME (durable medical equipment), recommended by Dr. Bazaz.

2. Respondents shall pay Claimant TTD from April 8, 2021, to May 2, 2021.

3. Claimant's AWW is $946.11, and TTD should be paid based on an AWW of $946.11.

4. Respondents shall pay for the medical treatment Claimant received at the Medical Center of Aurora – emergency department – on April 7, 2021.

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

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

DATED: September 21, 2022

/s/ Glen Goldman

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-197-745-001

ISSUES

1. Whether Claimant sustained a compensable, repetitive motion/trauma work injury on or about February 3, 2021.

2. Whether the left carpal tunnel release recommended by Dr. Nicholas Noce is reasonable and necessary to cure or relieve the effects of a compensable work injury.

FINDINGS OF FACT

1. Claimant was employed by Employer for approximately 12 years. Claimant's primary job responsibilities were as a "tail conditioner" which required her to remove tails from cow carcasses using a knife and a hand-held hook. Claimant testified her job duties consisted of cutting, washing, and trimming cow tails, and sharpening her knife by hand. Claimant testified she used a hook and a knife to trim 2,300 to 2,500 tails per day. Although Claimant has held other positions, the overwhelming majority of her employment has been as a tail conditioner.

2. On February 4, 2021, Claimant sustained a work-related laceration to her left thumb, and received treatment for that condition. During the course of treatment, Claimant began reporting pain and her left arm and forearm.

3. On March 23, 2021, Claimant was examined by authorized treating physician Daniel Bates, M.D., at the Banner Occupational Health Clinic. Dr. Bates documented complaints of pain along the flexor tendon and a positive Tinel's sign with radiation of symptoms into the first, second, and third digits of the left hand. Claimant also had evidence of a trigger thumb. Dr. Bates referred Claimant to hand specialist, Nicholas Noce, M.D., for evaluation.

4. Claimant saw Dr. Noce on April 22, 2021. Dr. Noce opined Claimant's numbness and tingling in her hand was unrelated to her thumb laceration, but Claimant appeared to have some carpal tunnel symptoms. Dr. Noce recommended an EMG which he opined was unrelated to Claimant's thumb laceration claim. He indicated if Claimant's EMG were negative, she should follow up with workers' compensation, as there would be nothing further to do with respect to her carpal tunnel symptoms. (Ex. C).

5. On April 27, 2021, Dr. Bates ordered the EMG, which Gregory Reichhardt, M.D., performed on May 19, 2021. Claimant reported to Dr. Reichhardt pain through the entire left arm, the palmar aspect of the left hand and pain in the left thumb. The EMG study showed a "mild left median sensory neuropathy at the wrist without motor involvement." The study was otherwise negative. Dr. Reichhardt posited the EMG demonstrated a possible component of carpal tunnel syndrome. He also noted that Claimant's more

diffuse left upper extremity numbness was of unclear etiology. He indicated it would be reasonable to consider a carpal tunnel injection for diagnostic purposes. (Ex. G).

6. After reviewing the results of the EMG, Dr. Bates referred Claimant back to Dr. Noce to discuss procedural intervention for minor carpal tunnel syndrome. (Ex. F). Claimant saw Dr. Noce on July 27, 2021, reporting numbness and burning pain in her distal forearm and into the index, middle and ring finger of the left hand. Claimant's trigger thumb was completely resolved. Dr. Noce opined Claimant's EMG showed mild carpal tunnel syndrome. He recommended a steroid injection for left carpal tunnel syndrome to see if Claimant improved. He indicated: "All of her symptoms are not obviously carpal tunnel and so it would be best to try a steroid injection even if it only gives her temporary relief. If she does get temporary relief of most or all of her symptoms and then the symptoms return then I would recommend carpal tunnel release, and this would likely have very good results. If she has little to no improvement from the steroid injection then it would be difficult to say how much improvement she would get from a carpal tunnel release." He performed the steroid injection on July 27, 2021. (Ex. C).

7. Claimant returned to Dr. Bates on August 3, 2021, noting that she had not yet had any improvement of her symptoms from the carpal tunnel injection. Dr. Bates indicated that it was too early to determine the efficacy of the injection, and suggested waiting two to four weeks to determine the effectiveness, and then he would defer to Dr. Noce for treatment options. (Ex. F).

8. On August 10, 2021, Claimant returned to Dr. Bates and noted that she had increased wrist pain after the injection. He noted "I am wondering, if the carpal tunnel injection has actually been somewhat beneficial and the patient has been using the wrist more freely if not subconsciously, and has flared up her wrist tendinitis, as most of the discomfort seems to be over the flexor carpi muscles. He again indicated he would defer to Dr. Noce regarding wither a carpal tunnel release would be beneficial. He stated: " I am inclined to believe that this ought to be done as the patient does not really have other objective findings in her wrist which would explain the ongoing discomfort other that the carpal tunnel syndrome and median never damage." He recommended a trial of gabapentin to address pain. (Ex. F).

9. Claimant saw Dr. Noce again on August 26, 2021, reporting she had a "small amount of improvement of some of her numbness and tingling in her fingers and then she developed a lot of pain along her wrist and up into her elbow. Claimant reported continued numbness and tingling in her fingers, but also pain into the volar aspect of the wrist, forearm, and elbows. Dr. Noce opined "I believe most of her symptoms are from carpal tunnel syndrome however some of her forearm and proximal pain may or may not be from carpal tunnel syndrome." He indicated he though Claimant's hand numbness and tingling would improve with a carpal tunnel release, but it was difficult to predict whether it would improve her forearm pain. (Ex. C).

10. Claimant saw Dr. Bates' on August 31, 2021. Dr. Bates recommended Claimant undergo a carpal tunnel release as recommended by Dr. Noce based on documented median nerve damage. He also noted Claimant's "full left upper extremity discomfort is

unlikely to be caused by the carpal tunnel syndrome, and does not have an underlying physiologic cause from our objective investigation thus far." He recommended a trial of massage to address Claimant's non-carpal tunnel symptoms in the left arm. (Ex. F).

11. At Respondents' request, Claimant was evaluated by Thomas Mordick, M.D., a hand surgeon, on January 4, 2022. Later, on June 7, 2022, Dr. Mordick reviewed additional records. Dr. Mordick's examination and opinions were focused on Claimant's thumb laceration, which he opined was at maximum medical improvement (MMI). He opined that if Claimant had carpal tunnel issues, those issues are unrelated to her thumb laceration. The opinions expressed in his reports are immaterial to the issue of whether Claimant has work-related carpal tunnel syndrome. (Ex. A & B).

12. On January 20, 2022, Dr. Bates responded to a letter from Respondents regarding Claimant's thumb laceration claim. He agreed with Dr. Mordick that Claimant was at MMI for that claim. In addition, he stated that the thumb laceration was not at issue. Instead, he indicated Claimant had been treated for ongoing pain and paresthesia of the thumb "which is likely to be caused by her mild median neuropathy noted on EMG." He further noted that Claimant's "occupation has multiple primary risk factors for cumulative trauma disorder, including carpal tunnel syndrome and trigger finger. I have advised the patient [illegible] to file a separate claim for the carpal tunnel syndrome multiple times." He further stated that Claimant needed a separate injury claim for carpal tunnel syndrome separate from the laceration claim, and that Claimant needed a carpal tunnel release procedure. (Ex. 4).

13. On February 16, 2022, Claimant filed a Worker's Claim for Compensation for a repetitive injury to the left wrist and arm, with a stated date of injury as February 3 2021. (Ex. I).

14. Claimant testified at hearing that she had no previous diagnosis or treatment for carpal tunnel symptoms, and she would like to proceed with the carpal tunnel surgery recommended by Dr. Noce and Dr. Bates. Claimant's medical records demonstrate that Claimant was seen at Employer's in-house clinic between October 20, 2017 and October 30, 2017 for complaints of left neck, arm, shoulder, and hand pain that she attributed to her job duties. No definitive diagnosis was provided, and no credible evidence was offered to indicate Claimant had treatment for these conditions after October 2017. (Ex. D). Claimant testified that the pain she experiences now is different and more severe than the pain she experienced in 2017.

15. Respondents presented Dr. Mordick's testimony by deposition in lieu of live testimony. Respondents moved to qualify Dr. Mordick as an "expert" without designating his area of expertise. However, the ALJ infers from the testimony that Dr. Mordick's expertise is in hand surgery, and admits Dr. Mordick as an expert in hand surgery.

16. Dr. Mordick testified that during his examination of Claimant in January 2022, Claimant had markedly reduced strength and range of motion in the fingers, flexors and extensors, and restricted strength in the thumb. He noted that Claimant was tender to palpation over the forearm from the elbow to the wrist, and the palm and dorsal aspect of

the wrist. He also noted that Claimant had diminished sensation in all five digits of the left hand compared to the right.

17. Dr. Mordick testified that he did not believe Claimant has carpal tunnel syndrome because her presentation was atypical for carpal tunnel. Specifically, Claimant had symptoms on the dorsal aspect of her hand, numbness in the small finger, and limited finger extension, which he opined were atypical for carpal tunnel syndrome. Dr. Mordick cited the "upper extremity guidelines"[1], as a basis for his opinions. He testified that Claimant's EMG performed by Dr. Reichhardt was "atypical" and that an EMG is not conclusive proof of carpal tunnel syndrome. Dr. Mordick did not examine Claimant for carpal tunnel syndrome, and his opinion is based on his review of Claimant's medical records, and additional documentation he received the day of his deposition. Dr. Mordick testified that carpal tunnel repetitive movement can cause carpal tunnel syndrome, and that he did not perform any causation analysis with respect to Claimant because he did not receive some information until shortly before his deposition. Dr. Mordick also testified he felt that Claimant would have a poor result from surgery. Dr. Mordick's opinions were not persuasive.

CONCLUSIONS OF LAW

Generally

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

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

[1] The ALJ notes that Dr. Mordick referenced specific pages of the "upper extremity guidelines" in his testimony. For example, Dr. Mordick testified "The CATS diagrams, the upper extremity guidelines, page 10, indicates that if there is pain on the dorsal of the forearm of the hand, it is unlikely to be carpal tunnel syndrome." The ALJ is unable to locate any such statement in the Colorado Medical Treatment Guidelines, W.C.R.P. Rule 17. The Colorado Medical Treatment Guidelines do not contain specific "upper extremity guidelines." The MTGs for carpal tunnel syndrome are contained in the Cumulative Trauma Guidelines, W.C.R.P. Rule 17, Exhibit 5. The specific pages referenced by Dr. Mordick do not correspond with W.C.R.P. Rule 17, Exhibit 5, (effective March 2, 2017), nor with the two prior versions of the Cumulative Trauma Guidelines (*i.e.*, the versions effective October 30, 2010, and January 1, 2006). Consequently, the ALJ is unable to ascertain the "guidelines" Dr. Mordick referenced in his testimony.

inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

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

COMPENSABILITY

A claimant's right to recovery under the Workers Compensation Act is conditioned on a finding that the claimant sustained an injury while the claimant was "at the time of the injury, … performing service arising out of and in the course of the employee's employment." § 8-41-301(1)(b), C.R.S.; *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The Claimant must prove her injury arose out of the course and scope of her employment by a preponderance of the evidence. § 8-41-301(1)(b) & (c), C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). "Arising out of" and "in the course of" employment comprise two separate requirements. *Triad Painting Co.*, 812 P.2d at 641.

An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d at 641; *Hubbard v. City Market,* W.C. No. 4-934-689-01 (ICAO, Nov. 21, 2014).

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

The claimant must prove causation to a reasonable probability. Lay testimony alone may be sufficient to prove causation. However, where expert testimony is presented on the issue of causation it is for the ALJ to determine the weight and credibility to be assigned such evidence. *Rockwell Int'l v. Turnbull,* 802 P.2d 1182 (Colo. App. 1990); *Marjorie Jorgensen v. Air Serve Corp.,* W.C. No. 4-894-311-03, (ICAO, Apr. 9, 2014).

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

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

This section imposes additional proof requirements beyond those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the workplace than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). The onset of a disability occurs when the occupational disease impairs the claimant's ability to perform his regular employment effectively and properly or when it renders the claimant incapable of returning to work except in a restricted capacity. *Leming v. Indus. Claim Appeals Office*, 62 P.3d 1015 (Colo. App.2002); *In re Leverenz*, W.C. No. 4-726-429 (ICAO, July 7, 2010).

The claimant bears the burden to prove by a preponderance of the evidence that the hazards of the employment caused, intensified, or aggravated the disease for which compensation is sought. *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000); *Wal-Mart Stores, Inc. v. Indus. Claim Appeals Office,* 989 P.2d 251 (Colo. App. 1999). The question of whether the claimant has proven causation is one of fact for the ALJ. *Faulkner, supra*. In this regard, the mere occurrence of symptoms in the workplace does not require the conclusion that the conditions of the employment were the cause of the symptoms or that such symptoms represent an aggravation of a preexisting condition. *See F.R. Orr Constr. v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAO Aug. 18, 2005). Once claimant makes such a showing, the burden shifts to respondents to establish both the existence of a non-industrial cause and the extent of its contribution to the occupational disease. *Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992).

Claimant has established by a preponderance of the evidence that she has sustained a compensable occupational injury arising out of the course of her employment with Employer. The credible evidence establishes that Claimant has carpal tunnel syndrome causally related to her employment. Claimant's job position requires continual,

repetitive motions with her hands, including using a hook and knife 2,300-2,500 per day for a period of years. Although Claimant's job did change occasionally, her primary job for the vast majority of her employment was as a tail conditioner.

The Colorado Medical Treatment Guidelines, W.C.R.P. 17, Exhibit 5, provide guidance for the diagnosis of carpal tunnel syndrome. The "Physical Examination Findings Reference Table," (¶ D.1.f., p. 13), and the Specific Physical Exam Findings section (¶ G.1.d.), indicate a clinical diagnosis of carpal tunnel is confirmed by 1) patient history of paresthesia in two of the following digits: thumb, index, and middle finger; and 2) At least one of the following physical exam signs: Positive Phalen's sign, modified Phalen's test; positive Tinel's sign over the carpal tunnel; positive compression test; compression with wrist flexed; thenar atrophy; weakness of the abductor pollicis brevis, and/or sensory loss.

Claimant reported numbness, pain, and radiation into at least the index and middle finger, and had a positive Tinel's sign on examination by Dr. Bates. Additionally, Claimant's EMG testing, performed by Dr. Reichhardt was consistent with mild carpal tunnel syndrome. Accordingly, the ALJ finds that Claimant substantially meets the criteria for diagnosis of carpal tunnel syndrome. Although Claimant reported symptoms in her left upper extremity that are unrelated to carpal tunnel syndrome, no credible evidence was admitted that the existence of these other symptoms renders the diagnosis of carpal tunnel inaccurate.

The ALJ also credits Dr. Bates' opinion that Claimant's occupation has multiple primary risk factors for cumulative trauma disorder, including carpal tunnel syndrome and trigger finger." Moreover, the repetitive use of a knife and hook are a peculiar risk of Claimant's employment. Dr. Bates' opinion is consistent with Dr. Mordick's acknowledgement that carpal tunnel can be caused by repetitive motion. Claimant credibly testified that she uses her knife and hook 2,300 - 2,500 times per day in the same repetitive motion, and has done this for multiple years. Based on the totality of the evidence, the ALJ finds it more likely than not that Claimant's carpal tunnel syndrome arose out of the course of her employment with Employer.

SPECIFIC MEDICAL TREATMENT

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a), C.R.S. A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant's physical needs. *Bellone v. Indus. Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., W.C. No. 4-517-537, (ICAO May 31, 2006). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School Dist.,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish

entitlement to the benefits. *Martin v. El Paso School Dist.*, W.C. No. 3-979-487, (ICAO Jan. 11, 2012); *Ford v. Regional Transp. Dist.,* W.C. No. 4-309-217 (ICAO Feb. 12, 2009).

Claimant has established by a preponderance of the evidence that carpal tunnel release surgery recommended by Dr. Noce and Dr. Bates is reasonable and necessary to cure or relieve the effects of Claimant's industrial injury. As found, Claimant has a work-related diagnosis of carpal tunnel syndrome. The ALJ finds the opinions of Dr. Bates and Dr. Noce that such surgery is necessary to address Claimant's carpal tunnel symptoms more credible than the contrary opinion of Dr. Mordick. The fact that carpal tunnel surgery may not address Claimant's unrelated does not render the proposed surgery unreasonable or unnecessary. Claimant's request for authorization of surgery is granted.

ORDER

It is therefore ordered that:

1. Claimant sustained a compensable occupational disease or injury in the form of carpal tunnel syndrome, on or about February 2, 2021.

2. Claimant's request for authorization of carpal tunnel release surgery is granted.

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

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

DATED: September 21, 2022

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-067-944-003

ISSUES

The issues set for determination included:

- Did Claimant meet her burden of proof to overcome the Division of Workers' Compensation-sponsored IME ("DIME") physician's (Gregory Reichhardt, M.D.) opinions on maximum medical improvement and permanent impairment rating?

- If Claimant overcame Dr. Reichhardt's opinions on the issue of impairment, what was her impairment rating?

- Is Claimant entitled to temporary total disability benefits from July 23, 2019 through February 27, 2020?

STIPULATION

The parties stipulated that Claimant's average weekly wage should be $596.33 from the date of injury to Nov. 30, 2018, and $720.61 from December 1, 2018 forward.[1] Also, Respondents agreed that Delia Bakeman, M.D. at UC Health is in the authorized chain of referrals.

PROCEDURAL HISTORY

A Summary Order was issued by the ALJ on August 12, 2022 and served on August 12, 2022. Claimant, by and through her attorneys of record requested a Corrected Order. A Summary Order was issued on August 12, 2022. On August 18, 2022, a Corrected Summary Order was issued pursuant to 8-43-302(1), C.R.S. Respondent requested a full Order on August 23, 2022. This Order follows.

FINDINGS OF FACT

1. Claimant was employed by Employer as a special education para- educator. She worked in that capacity assisting a teacher in a large classroom.

2. On January 22, 2018, Claimant was injured when she was struck in the back of her head by a soccer ball that was either thrown or kicked by a student from less than 4 feet away. Claimant testified she felt pain and was dizzy. Claimant also said she did not have a memory of the next two hours and experienced neck pain, as well as a headache.

[1] This Stipulation was approved by the Order issued on May 16, 2022.

3. There was no evidence in the record that Claimant required treatment for her cervical spine before January 2018.

4. Claimant initially treated at Respondent's ATP, Peak Form on Jan. 23, 2018.[2] She reported 6/10 pain in the lower back, upper back and neck, as well as nausea and weakness. Her pain was exacerbated by movement. She was diagnosed with a mild TBI, concussion, lumbar strain and cervical strain. Claimant was initially returned to full duty.

5. On January 26, 2018, Claimant was evaluated by Roxana Witter, M.D. Dr. Witter's assessment was: concussion without LOC; thoracic strain; lumbar strain; cervical strain. Claimant was taken off work by Dr. Witter, who also prescribed medications and massage therapy before PT.[3]

6. On February 6, 2018, Claimant underwent a CT of her head/brain and the films were read by Brian Steele, M.D. Dr. Steele's impression was: normal noncontrast head CT, with no skull fracture or intracranial hemorrhage following trauma. Claimant remained off work and on February 16, 2018, Dr. Witter issued work restrictions of office work only.

7. Claimant was treated by Rebecca Hutchins, O.D., F.C.O.V.D. for vision therapy. Dr. Hutchins evaluated Claimant on May 23, 2018 and diagnosed: convergence insufficiency, general binocular vision disorder, Saccadic dysfunction, and photophobia. She indicated this was "post trauma vision syndrome" and recommended prism glasses and vision therapy. She stated that most mild TBI patients require 4-9 months of weekly therapy to regain their visual skills.

8. Claimant testified that during the first six months after her injury the biggest problems were the visual disturbance, she had difficulty driving, was greatly fatigued, had headaches regularly and neck pain.

9. On August 20, 2018, Claimant underwent a cervical spine MRI and the films were read by Kevin Wooley, M.D. Dr. Wooley's impression was: multilevel degenerative changes, including right sided facet arthropathy at C2-C3; moderate left-sided facet arthropathy at C4-C5, disc bulge/osteophyte complex and uncovertebral joint hypertrophy at C5-C6. No disc herniations were noted. The ALJ inferred that the MRI was ordered because Claimant reported cervical symptoms.

10. Claimant returned to Peak Form on Sept 24, 2018 and was evaluated by physician's assistant Jasmine Wells. At that time, Claimant reported pain in the left shoulder, neck and jaw. Claimant's diagnoses were: concussion without LOC; thoracic strain; lumbar strain; cervical strain. Claimant was to continue PT, treatment with Dr. Cortgageorge and visual therapy with Dr. Hutchins. PA Wells reported that she reached

[2] Exhibit 14, p. 699.

[3] Exhibit 14, p. 708.

out to Employer and talked to KB[Redacted] to see if they could accommodate restrictions of 20 minutes of work, 10 minutes of rest for 2-3 hours per day. Employer could not accommodate those restrictions.

11. On Oct. 26, 2018, Claimant returned to at Peak Form and was evaluated by Ethan Moses, M.D. for the first time. Dr. Moses opined she would have impairment for both her cervical and TBI. Dr. Moses noted Claimant was interested in transitioning her back to work, but the employer is not willing to take her back with restrictions. He reported that Claimant was starting to volunteer 1 hour a week and wanted her to do that for Employer.

12. Matthew Brodie, M.D. began overseeing Claimant's treatment on December 14, 2018. Dr. Brodie's diagnoses were: concussion without loss of consciousness; strain of muscle, fascia and tendon of lower back; strain of muscle, fascia and tendon at neck level.

13. The ALJ found Dr. Brodie evaluated Claimant at regular intervals and over the next eighteen months, she received treatment for cervical pain and spasm, as well as visual disturbance. Dr. Brodie made objective findings in reference to Claimant's cervical spine, including restrictions in cervical ROM. The ALJ determined this was objective evidence of an injury to this area of the body.

14. Alexander Zimmer, M.D. performed an independent medical examination on March 11, 2019 at the request of Respondent. At that time, Claimant reported trouble focusing, fatigue, along with pain in the left neck, jaw and shoulder area. She also reported memory problems. On examination Claimant had decreased sensation for her cranial nerves and normal range of motion ("ROM") for the neck. The sensory exam was normal for the upper and lower extremities.

15. Dr. Zimmer's impression was that Claimant had multiple symptoms. opined that Claimant did not have any objective evidence of neurological abnormalities involving the brain. Dr. Zimmer referenced Dr. Cotgageorge, without a clear history of impaired consciousness to some degree, it was difficult to make a diagnosis of traumatic brain injury. Dr. Zimmer stated the increasing symptoms over time also were completely atypical and not consistent with a post-concussion-type syndrome. Dr. Zimmer stated subjective symptoms may be consistent with an adjustment disorder with anxious and depressed mood or to other, non-neurological factors. Claimant's work restrictions would be related to her psychological condition. Dr. Zimmer opined that Claimant was neurologically at maximum medical improvement and felt she would have permanent impairment for the cervical spine as well as psychological issues.[4]

16. Respondent filed a General Admission of Liability ("GAL") on March 4, 2019 amending the average weekly wage to $547.44 and temporary total disability rate to $364.96 based on a COBRA coverage letter effective December 1, 2018. Temporary

[4] Exhibit I, p. 1102.

total disability benefits at the $364.96 rate were admitted from December 1, 2018 and ongoing. The ALJ inferred that the addition of Claimant's COBRA benefits to the AWW was some evidence that her employment was terminated.

17. Claimant was reevaluated by Dr. Brodie on May 14, 2019 and documented that he had reviewed the reports of the specialists and (including Dr. Zimmer) and opined Claimant was stable from a neurological standpoint. Claimant psychological condition had been full assessed and he referred Claimant to a psychiatrist. Dr. Brodie noted a trial return to work would be considered.

18. On June 18, 2019, Dr. Brodie evaluated Claimant, at which time Claimant was receiving treatment for headaches neck and back pain/spasms and visual disturbance. Dr. Brodie he confirmed Claimant remained on modified duty and limited her work to four hours a day. The ALJ inferred school was not in session when Dr. Brodie concluded Claimant could work modified duty at this appointment.

19. There was no evidence in the record that Employer offered modified duty to Claimant.

20. Claimant returned to Dr. Brodie on July 23, 2019. Claimant was reporting symptoms of fatigue, left sided jaw pain and left-sided neck pain. Positive facet loading was noted on the left, but no radiation of pain was found. Dr. Brodie's diagnoses were: concussion without loss of consciousness; strain of muscle, fascia and tendon of lower back; strain of muscle, fascia and tendon at neck level; adhesions and ankyloses of temporomandibular joint; left temporomandibular joint dysfunction.

21. After discussing her functionality for work, Dr. Brodie said Claimant could return to work with no restrictions.[5] Dr. Brodie noted there were improvements with regard to Claimant's cognitive functionality and vision issues. Dr. Brodie stated this was to be considered a trial to determine whether disability resulted from any potential symptomology that may occur while working. Dr. Brodie contacted Employer, but it was unclear what transpired regarding any discussions regarding Claimant's trial return to work.

22. KB[Redacted] of the Employer testified that an employee must complete a Fitness for Duty ("FFD") test to return to work for the Employer if an employee has not been working for three months or more due to some type of leave. Ms. KB[Redacted] testified that Claimant did not complete the FFD test and therefore was not capable of returning to her pre-injury employment position. The ALJ inferred that this was a policy of Employer that required completion to the FFD. Ms. KB[Redacted] testified that Claimant had not requested a repeat FFD test to date. Ms. KB[Redacted] testified that the Employer encouraged Claimant to apply for other positions with the Employer once she was advised she could not return to her pre-injury position.

[5] Exhibit C, p. 34.

23. Claimant testified that she attended a Fitness for Duty (FFD) test per request of the Employer but was not able to complete the FFD test due to dizziness. Ms. KB[Redacted] testified that Claimant did not complete the FFD and was not capable of returning to her pre-injury employment position. The ALJ was unable to conclude from the evidence in the record whether Claimant's position was open at the time she attended the FFD test. The imposition of this requirement contributed to Claimant's wage loss.

24. On August 2, 2019, Respondent filed a GAL terminating temporary total disability benefits as of July 23, 2019 per ATP, Dr. Brodie's report returning Claimant to regular work duty.

25. Claimant returned to Dr. Brodie on August 6, 2019. Dr. Brodie once again noted Claimant was able to return to full duty work. The ALJ noted Dr. Brodie did not appear to evaluate Claimant's ability to return to specifically her special education paraeducator position, as evidenced by his recommendation that Claimant obtain any employment.

26. Claimant underwent an independent medical exam with James E. Berwick, D.D.S at the request of Respondent on September 20, 2019. Dr. Berwick noted Claimant was not struck directly in the mandible and she did not have a mechanism of injury that would have caused derangement of the TMJ-s. Dr. Berwick said her symptoms of parafunction were like not related to the work injury. Dr. Berwick opined that Claimant's dental, face, jaw, and/or temporomandibular (TMJ) conditions were not related to the January 22, 2018 incident.

27. Dr. Brodie evaluated Claimant on October 31, 2019 at which time Claimant reported continued treatment for headaches and visual disturbance. Dr. Brodie noted palpable tenderness to the cervical spine, as well as the sensation of pain and reduced ROM in left rotation and left lateral bending. Dr. Brodie's diagnoses were: concussion without loss of consciousness; strain of muscle, fascia and tendon at neck level; adhesions and ankyloses of temporomandibular joint; left temporomandibular joint dysfunction. The WCM 164 indicated Claimant could return to regular duty.

28. On November 11, 2019, Claimant underwent an independent medical examination with Carlos Cebrian, M.D. at the request of Respondent. At that time Claimant's symptoms. Claimant's work-related diagnoses included mild traumatic brain injury; cervical strain. Dr. Cebrian opined that any injury was mild and Claimant could be expected to recover. Dr. Cebrian said Claimant's complaints were somatic in origin and her pain complaints were out of proportion to the objective medical evidence. Dr. Cebrian opined the request for Botox treatment and injections should be denied as not related to the work injury.

29. Dr. Cebrian opined Claimant was at maximum medical improvement as of November 11, 2019 (and potentially as early as March 31, 2019) as Dr. Cebrian opined Claimant had a 0% permanent medical impairment, as defined by the *AMA Guides*. There was no evidence that Dr. Cebrian performed ROM testing of Claimant's cervical spine

with dual inclinometers. Dr. Cebrian stated Claimant was able to work in a full and unrestricted capacity and there was no claim-related basis for restrictions, either temporary or permanent. Dr. Cebrian's opinion regarding permanent impairment was not persuasive the ALJ.

30. Claimant was evaluated by Dr. Brodie on multiple occasions over the next eight months. The following summarizes Dr. Brodie's opinions with regard to Claimant's return to work:

- July 23, 2019: return to work–no restrictions. Dr. Brodie referred to this as a "trial and said clinically assumed that vision-based dysfunction is responsible for patient's intermittent residual symptomology."
- August 6, 2019: released to unrestricted work "including work with another employer".
- August 22, 2019: released to return to full duty-no restrictions.
- October 4, 2019: able to work full duty–no restrictions.
- October 31, 2019: return to work full duty–no restrictions.
- November 11, 2019: return to work full duty–no restrictions.
- December 19, 2019: return to work full duty–no restrictions. Dr. Brodie noted Claimant asked for work restrictions.
- January 6, 2020: return to work full duty–no restrictions. Dr. Brodie discussed restrictions for visual impairment
- January 20, 2020: return to work full duty–no restrictions.

31. The ALJ concluded Claimant's admitted work injury and its sequalae following it caused her to lose wages.

32. Claimant returned to Dr. Brodie on February 27, 2020. At that time, Dr. Brodie discussed her treatment with Dr. Tanner, specifically that the latter was not able to provide a prognosis and that it was difficult to determine whether the injections were beneficial or palliative. Dr. Brodie opined that the it was not possible to say there was an objectively-based trend toward continuous improvement from the treatment for migraine headaches, neck pain and fatigue. Dr. Brodie's evaluation of Claimant documented spasm in the cervical spine. The ALJ found this was evidence of continued cervical spine dysfunction.

33. Dr. Brodie concluded Claimant was at MMI. Dr. Brodie assigned a 20% whole person impairment pursuant to the *AMA Guides* for a neurological impairment using table 1, page 109, episodic neurologic disorders, section B. This was related to the convergence disorder and relative consistency of clinical assessments regarding central nervous system dysfunction. Dr. Brodie stated it was less than 50% probable that Claimant sustained a permanent cervical injury. Dr. Brodie did not provide any detail regarding this analysis. There was no evidence in the record that Dr. Brodie performed ROM testing of Claimant's cervical spine with dual inclinometers.

34. Dr. Brodie recommended maintenance treatment in the form of additional 6 sessions of cognitive rehabilitative/linguistic therapy and additional six sessions of

migraine headache disorder treatment with Dr. Tanner. Dr. Brodie released Claimant to work full duty with no restrictions.

35. The ALJ found that the treatment records of Dr. Brodie/Peak Form reflected more than two years of symptoms and treatment for the cervical spine.

36. Claimant continued to receive treatment for visual disturbance after MMI. Dr. Hutchins completed a form "to determine if the employee has a medical condition that prevents her from returning to work without accommodations". Dr. Hutchins' response, dated May 11, 2020, stated that Claimant was still under her care and she has substantial impairment walking and seeing. [6] Dr. Hutchins stated Claimant also had major impairment is learning, reading, thinking, concentrating, and memorizing. She had moderate impairment for numerous others including working and interacting with others. Dr. Hutchins said Claimant had "difficulty functioning in noisy environments with a lot of movement present", had difficulty walking and this made her nauseous**.** Dr. Hutchins opined that she was unable to predict when the employee is likely to return to full time work. The ALJ concluded Dr. Hutchins' opinion that Claimant could not return to work without restrictions.

37. Respondent-Employer also sent the same form to Allison Gray, M.D., a neurologist that was treating Claimant for her post-concussion syndrome and migraines. Her response was dated April 27, 2020. She noted several areas in which Claimant was substantially impaired including writing, concentrating, hearing and seeing. There were other areas of moderate impairment like interacting with others, memorizing, learning and "working". Dr. Gray stated that reasonable accommodations would include allowing breaks every two hours for 15 minutes, limiting work to 5-6 hours a day, reducing screen time as much as possible, allow use of ear plugs to reduce noise, and tinted glasses to reduce light**.** Dr. Gray said it was unknown if Claimant could return to full time work, but possibly in August of 2020.[7]

38. On July 6, 2020, Claimant underwent the DIME, which was performed by Dr. Reichhardt. At that time, she reported pain in her jaw, which radiated to the neck, shoulder, arm and left thumb when it flared up. She had intermittent pain in the right thumb, but did not have low back pain. Claimant also reported decreased attention, along with visual symptoms. On examination, Dr. Reichhardt noted Claimant appeared to be uncomfortable during the evaluation and had pain in the cervical spine. Claimant's gait, balance and coordination were normal. Her reflexes were normal in the upper and lower extremities. Cervical range of motion was: 15/4 flexion, extension 25/5, right lateral bending 29/5, left lateral bending 30/3 right rotation 45, left rotation 30. Dr. Reichhardt did not provide an explanation as to the

39. Dr. Reichhardt's clinical diagnoses were: diffuse cervical, periscapular pain-probable myofascial pain; jaw pain, possible myofascial pain superimposed on a subluxed

[6] Exhibit 13, pp. 697-698.

[7] Exhibit 4, pp. 484-487.

disc. (Myofascial pain was work related and subluxed TMJ was likely not work related.); possible TBI with ongoing visual symptoms; assorted tinnitus following swimmers ear; decreased facial sensation, non-work related. Dr. Reichhardt concluded Claimant was at MMI as of February 27, 2020 and assigned a 20% medical impairment for the TBI, specifically for episodic neurologic disorder for moderate interference with daily activities.

40. Dr. Reichhardt concluded there was no permanent impairment for the temporomandibular joint dysfunction and no impairment for psychological dysfunction or the lumbar spine. He stated Claimant did not have a specific cervical spine disorder. He opined Claimant's diagnosis was probable generalized myofascial involvement.[8] The ALJ noted Claimant's treatment for cervical issues was part of the medical records summary in the DIME report, however, Dr. Reichhardt did not provide any detail regarding this analysis. There was no evidence in the record that Dr. Reichhardt performed ROM testing of Claimant's cervical spine with dual inclinometers (i.e. no worksheets were included.)

41. On September 4, 2020, an FAL was filed on behalf of Respondent, admitting for Dr. Reichhardt's medical impairment rating. The FAL admitted for maintenance medical treatment.

42. Claimant was evaluated by Dr. Parry on February 9, 2021. She reported continuous headaches and some degree of neck pain since the time of the accident. Claimant told Dr. Parry she responded only on a short-term basis to intervention such as medial branch blocks, rhizotomy, chiropractic and massage therapy. She also had fatigue with visual tasks and increased noise. On examination, Claimant had a notable scoliotic curve convex to the right in the mid thoracic area. Her cervical spine had increased paravertebral muscle spasm, more on the left than the right. Tenderness was also noted on the left medial scapular border, but no scapular winging. Claimant had some mild middle trapezius weakness, but otherwise full strength at the shoulder, elbow, wrist and fingers.

43. Claimant's cervical ROM was measured at 40° of flexion 40° of cervical extension, 25° of right lateral flexion, 20° of left lateral flexion, right rotation was 65° and left rotation was 36°. Dr. Parry opined Claimant's direct work-related injury included the following diagnoses: mild traumatic brain injury; central vestibular dysfunction, with the possibility of additional peripheral vestibular function; visual processing and binocular dysfunction; probable skew deviation and conjugate eye movement dysfunction; cervical strain.

44. Dr. Parry concluded Claimant was not at MMI, as she has never had a true course of vestibular rehabilitation, coupled at the appropriate time with vision therapy. Dr. Parry stated Claimant should have electrocochleography, if it had not been done in the past as part of the vestibular evaluation. Dr. Parry provided a provisional medical impairment rating, pursuant to the *AMA Guides* of 15% impairment for the cervical spine, which included 4% for specific disorder and loss of ROM at 11%; for a total of 15%. She also had a 20% impairment for a traumatic brain injury, including the headache, vestibular

[8] Exhibit H, p. 260; Exhibit 8, p. 569.

and visual dysfunction. Dr. Parry determined Claimant sustained a 32% whole person impairment. The ALJ credited Dr. Parry's opinion that Claimant had a permanent impairment to her cervical spine and for the brain injury.

45. Claimant testified that treatment she received from the various physicians since being placed at MMI has improved her condition.

46. Dr. Brodie, Dr. Reichhardt and Dr. Parry concluded Claimant sustained a 20% medical impairment related to the TBI. The ALJ credited these opinions and found Claimant sustained a 20% whole person impairment for brain-episodic disorders (as defined by the *AMA Guides*) as a result of her work injury.

47. Dr. Parry's opinions regarding MMI and permanent impairment differed from Dr. Reichhardt's.

48. Claimant did not prove that it was highly probable that Dr. Reichhardt was incorrect with regard to the issue of MMI.

49. Claimant proved that it was highly probable that the conclusions of Dr. Reichhardt were incorrect with regard whether she had permanent impairment to the cervical spine.

50. The ALJ determined Claimant overcame the opinions of DIME physician, Dr. Reichhardt as to cervical impairment and found she had a Table 53 impairment. Drs. Brodie, Reichhardt and Parry all agreed regarding her TBI impairment.

51. Claimant sustained a wage loss as a result of her work injury and she met her burden of proof and established she was entitled to TTD benefits from August 2, 2019 through February 27, 2020.

52. Claimant met her burden of proof and established she was entitled to PPD benefits based upon a 15% impairment of the cervical spine.

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

CONCLUSIONS OF LAW

General

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

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). The ALJ must make specific findings only as to the evidence found persuasive and determinative. An ALJ "operates under no obligation to address either every issue raised or evidence which he or she considers to be unpersuasive". *Sanchez v. Indus. Claim Appeals Office of Colo.*, 411 P.3d 245, 259 (Colo. App. 2017), citing *Magnetic Engineering Inc. v. Indus. Claim Appeals Office*, *supra*, 5 P.3d at 389.

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

Overcoming the DIME

As determined in Findings of Fact 2–5, Claimant suffered an admitted industrial injury on January 22, 2018 when the back of her head was struck by a soccer ball that was either thrown or kicked by a student. Claimant reported pain in the upper and lower back, neck, as well as nausea and weakness. *Id.* She was diagnosed with a mild TBI, concussion, lumbar and cervical strain. Claimant was also treated for visual disturbance, headaches and fatigue. *Id.* These symptoms were such were such that a CT scan was ordered on February 6, 2018. (Finding of Fact 6).

As found, Claimant also had symptoms related to her cervical spine immediately after the work injury. (Findings of Fact 4-5). Claimant underwent an MRI of the cervical spine and the ALJ inferred this was ordered because of Claimant's symptoms. (Finding of Fact 9). The medical records admitted at hearing reflected the fact that Claimant required treatment for a multiplicity of problems, which included visual disturbance, headaches, along with neck and back pain. These records reflected treatment from January 2018 through February 2020. As found, Dr. Brodie, who oversaw Claimant's treatment for much of this time included cervical spine diagnoses in his regular reports.

Dr. Brodie concluded Claimant was at MMI as of February 27, 2020. (Finding of Fact 33). As found, Dr. Brody decided Claimant did not have a permanent medical impairment in her cervical spine, but did not provide an explanation of his reasoning. *Id.* The ALJ also found Dr. Brodie did not measure Claimant's cervical ROM as part of this evaluation. *Id.*

Claimant underwent a DIME on July 6, 2020, which was performed by Dr. Reichhardt. As found, Dr. Reichhardt recorded some findings with regard to Claimant's cervical ROM, but did not provide an explanation as to the significance of his

measurements. (Finding of Fact 38). Dr. Reichhardt did not include the work sheets to demonstrate he tested Claimant's cervical spine ROM with dual inclinometers, as required. Dr. Reichhardt, while referencing Claimant's treatment for her cervical spine, did not specifically address the question of a Table 53 impairment. (Findings of Fact 39-40). Claimant then filed the instant AFH to contest Dr. Reichhardt conclusions.

The ALJ noted the question of whether Claimant overcame Dr. Reichhardt's opinion is governed by §§ 8-42-107(8)(b)(III) and (c), C.R.S. *Peregoy v. Indus. Claim Apps. Office*, 87 P.3d 261, 263 (Colo. App. 2004). These sections provide that the finding of a DIME physician selected through the Division of Workers' Compensation shall only be overcome by clear and convincing evidence. § 8-42-107(8)(b)(III), C.R.S.; *Leprino Foods Co. v. Indus. Claim Appeals Office*, 134 16 P.3d 475, 482-83 (Colo. App. 2005); *accord Martinez v. Indus. Claim Appeals Office*, 176 P.3d 826, 827 (Colo. App. 2007).

Clear and convincing evidence is highly probable and free from serious or substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995). The mere difference of medical opinions does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAO July 19, 2004). Claimant relied solely on the opinions of Dr. Parry to question the finding of MMI. (Finding of Fact 44). In the case at bar, the ALJ concluded Claimant did not adduce sufficient evidence to overcome Dr. Reichhardt's conclusion that she was at MMI. (Finding of Fact 48).

However, the ALJ determined Claimant met her burden of proof as whether she had impairment to the cervical spine. The ALJ's reasoning was twofold; first, Dr. Reichhardt did not provide an explanation as to why he concluded Claimant had no permanent cervical impairment. As found, his analysis was limited to two sentences, despite referencing Claimant's extensive cervical treatment in the records summary. The ALJ found there was no evidence in the record that Dr. Reichhardt performed ROM testing of Claimant's cervical spine with dual inclinometers. (Findings of Fact 38-40). The ALJ found that it was highly probable that the conclusions of Dr. Reichhardt were incorrect with regard to whether Claimant had permanent impairment to the cervical spine. (Finding of Fact 49).

Second, the ALJ found there was substantial support in Claimant's treatment records for a permanent medical impairment of the cervical spine. Dr. Brodie diagnosed Claimant with cervical sprain and dysfunction throughout his treatment of her in 2019-20. The ALJ found that the medical records in the record, including the treatment records of Dr. Brodie/Peak Form reflected more than two years of symptoms and treatment for the cervical spine. (Findings of Fact 13, 35). Yet, in his impairment report, Dr. Brodie concluded there was less than 50% probability Claimant had a permanent impairment to her cervical spine. The ALJ found he provided no analysis of the basis for this conclusion. There was also no evidence in the record that Dr. Brodie performed ROM testing of

Claimant's cervical spine with dual inclinometers. This was also true for Respondent's IME physician, Dr. Cebrian. (Finding of Fact 35).

In this regard, Dr. Parry was the only physician who tested Claimant's cervical ROM and this was more than a difference of opinion between the respective medical experts. Dr. Parry conducted ROM testing, pursuant to the *AMA Guides* and the ALJ credited her opinion regarding Claimant's medical impairment for that area of her body. (Finding of Fact 43). The ALJ concluded the dispute over Claimant 's impairment went beyond a difference in opinions and Claimant showed Dr. Reichhardt was more probably wrong in his conclusion. The ALJ determined Claimant met the criteria for a 15% whole person impairment rating for her cervical spine pursuant to Table 53 (*AMA Guides*) based upon Dr. Parry's opinion that she sustained this impairment as a result of her work injury. (Finding of Fact 44).

TTD Benefits

The issue of whether Claimant is entitled to TTD from July 23, 2019 through February 27, 2020 turned on whether she had a full duty release to return to work in on July 23, 2019 when Dr. Brodie returned her to full duty without restrictions. (Findings of Fact 20-21). Claimant contended that different ATP-s had issued work restrictions and therefore she was entitled to TTD benefits. Respondents disputed this and argued Dr. Brodie's return to work was a full duty release to return to work, which cut off their liability for TTD benefits. The determination of whether Claimant has been released to return to work by the attending physician is a question of fact. See *Popke v. Industrial Claim Appeals Office*, 944 P.2d 677 (Colo.App.1997).

Respondent cited *Burns v. Robinson Dairy, Inc*., 911 P.2d 661, 662 (Colo. App. 1995) for the proposition that TTD benefits were properly terminated when Dr. Brodie returned Claimant to her regular job. In *Robinson Dairy*, the employer and insurer admitted liability to temporary total disability benefits. Claimant's attending physician released the employee to return to work with full duties. Claimant attempted to return to work but alleged that he was unable to perform his duties. The ATP examined him and reiterated his opinion Claimant was able to work, had no permanent impairment and was at MMI. Other physicians who examined Claimant opined that he had not reached MMI. The ALJ found that Respondents properly terminated benefits pursuant to § 8-42-105(3)(c), C.R.S. based upon the attending physician's initial release to work. The Panel affirmed.

On appeal, the Court of Appeals affirmed and held where the attending physician had provided Claimant with a written release to work, the ALJ was bound to terminate TTD benefits pursuant to § 8-42-105(3)(c). Therefore, any evidence concerning Claimant's self-evaluation of his ability to perform his job was irrelevant and properly disregarded by the ALJ. The Court also reject Claimant's related contention that the denial of TTD benefits was erroneous because he was not yet at MMI, noting that "the occurrence of any one of the conditions enumerated in § 8-42-105(3) is sufficient to terminate benefits. Because the conditions are separated by the word "or," it is presumed

that the disjunctive sense was intended". *Burns v. Robinson Dairy, Inc*.,*supra*, 911 P.2d at 662-663.

However, the ALJ determined the record in the instant case contained conflicting opinions from attending physicians regarding Claimant's release to work, including ATP-s who evaluated Claimant after the Dr. Brodie released her to return to work and thus, the facts in this case diverge from those in *Burns v. Robinson Dairy, Inc*., *supra,* 911 P.2d at 661. As found, there was also a difference of medical opinions between Dr. Brodie and Drs. Hutchins and Gray. More particularly, the ALJ found these other ATP-s were still issuing work restrictions after this time (and after the MMI determination), which limited Claimant's return to work. (Finding of Fact 36-37). The facts in this case distinguish it from *Burns v. Robinson Dairy, Inc*., supra in that at least one ATP, Dr. Hutchins restricted her ability to return to full duty. *Archuletta v. Industrial Claim Appeals Office,* 381 P.3d 374 (Colo. App. 2016).

There were questions regarding whether Claimant could return to work without restrictions. Dr. Brodie initially characterized the return to work as a "trial" return to work on July 23, 2019. (Finding of Fact 21). The WCM 164 completed by Dr. Brodie specified Claimant had no restrictions, which Dr. Brodie then maintained through each subsequent evaluation to the time he placed her at MMI. (Finding of Fact 30). However, the ALJ found that Dr. Brodie did not appear to evaluate Claimant's ability to return to her para professional position in a full-time capacity in his subsequent evaluations, as evidenced by his recommendation that Claimant obtain any employment. (Finding of Fact 44).

In addition, there was no evidence that Claimant's position (or another para-educator position) was available and open at the time Dr. Brodie returned Claimant to work. As part of this issue, the evidence showed Employer required Claimant to complete a Fitness for Duty test to return to her position, which Claimant could not. (Finding of Fact 44). This requirement was imposed because Claimant had been off work for more than three months. The ALJ determined that the FFD test requirement after Claimant's work injury was a factor in her wage loss. (Finding of Fact 23). The ALJ found Claimant's wage loss was related to her work injury. (Finding of Fact 31).

Accordingly, the ALJ found Claimant met her burden of proof and is entitled to TTD benefits from August 2, 2019 through February 27, 2020 when Dr. Brodie placed her at MMI. (Finding of Fact 51).

ORDER

It is therefore ordered:

1. Claimant is at MMI.

2. Respondent shall pay TTD benefits from July 23, 2019 through February 27, 2020.

3. Respondent shall pay PPD benefits based upon a 32% whole person impairment, including medical impairment for Claimant's cervical spine and Brain-episodic disorders.

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

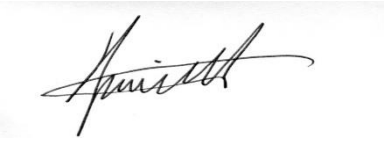
5. Respondent shall pay statutory interest at 8% on all benefits not paid when due.

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

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

DATED: September 21, 2022

STATE of COLORADO



Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-158-988-003

ISSUE

1. Did Respondents prove by a preponderance of the evidence that Claimant did not sustain a compensable work-related injury?

2. If Respondents proved by a preponderance of the evidence that Claimant did not sustain a compensable work-related injury, can Respondents withdraw the prior admission of liability?

3. Did Respondents prove by a preponderance of the evidence that Claimant committed fraud, and if so, are Respondents entitled to reimbursement for the amount of medical and temporary disability benefits issued on the claim?

FINDINGS OF FACT

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

1. Claimant is a ramp agent for Employer. On November, 6, 2020, Claimant lifted a piece of luggage and felt a pain in her belly button. (Tr. 22:16-23).

2. Claimant went to Concentra that same day and was evaluated by Jenelle Tittelfitz, PA-C. Claimant told Ms. Tittelfitz that she was lifting a 67-pound bag at work that morning, and felt a lot of pain. She rated her pain as a 10/10. Claimant described "a sudden onset of sharp shearing pain in the left lower abdomen with pain radiating down to her pelvis" after lifting the bag. By the time of the evaluation, the pain was constant, stabbing, and worse with movement or forward bending. Claimant admitted to not feeling well for the prior two weeks, but no additional details are included in the medical records. Ms. Tittelfitz noted Claimant's surgical history of a tubal ligation two years prior. Ms. Tittelfitz diagnosed Claimant with an abdominal wall strain, and ordered a stat CT scan of Claimant's abdomen and pelvis. (Ex. B).

3. A CT scan was performed on Claimant that day. According to the radiologist, the impression was an "umbilical hernia *unchanged from previous imaging*." (emphasis added). The report noted that the imaging was compared to imaging from November 2, 2020, just four days prior. (Ex. K).

4. The November 2, 2020 CT scan was ordered on October 26, 2020 by Quinn Litchfield, D.O. at Alpine Family Practice. Claimant saw Dr. Litchfield on October 26, 2020 for a well-woman examination. (Ex. D).

5. The medical records indicate that Claimant had a well-woman examination and noted she had a "pain in [her] stomach" with her lower left quadrant being worse. Claimant stated that the pain was a 9/10, would come and go, and felt like cramps/contractions.

Dr. Litchfield ordered a CT scan of Claimant's abdomen and pelvis. (Ex. D). Dr. Litchfield wanted Claimant to return in one to two weeks to follow up on her abdominal and pelvic pain. Claimant testified that the pain was just on the left side of her stomach. (Tr. 29:2-10). According to the November 2, 2020 CT report, claimant underwent a CT of her abdomen due to "left lower quadrant abdominal and back pain over 4 months." (Ex. K). Claimant's November 2, 2020 CT scan revealed a "prominent umbilical and infraumbilical hernia." *Id.*

6. Claimant testified that when she had her well-woman examination on October 26, 2020, she thought she might have had a tubal pregnancy. (Tr. 27:7-18). Claimant testified that Dr. Litchfield ordered the November 2, 2020 CT scan because he thought Claimant may have had a tubal pregnancy. (Tr. 47:24-48:10). According to the medical records, Dr. Litchfield ordered a urine pregnancy test. (Ex. D, p. 105).

7. The ALJ finds that as of October 26, 2020, Claimant thought she was pregnant, and Dr. Litchfield ordered a urine pregnancy test for Claimant.

8. As of November 6, 2020, however, Claimant knew she was not pregnant. Prior to receiving the CT scan of her abdomen and pelvis, Claimant completed a Clinical Screening Form. In response to the question whether there was any possibility of pregnancy, Claimant answered "no" two times. (Ex. K pp. 259-60).

9. Claimant testified she did not know the results of the November 2, 2020 CT scan when she went to Concentra on November 6, 2020 for her alleged work injury. (Tr. 32:1-9). Claimant further testified she told her Concentra doctors about the CT exam on November 2, 2020, but there is no evidence of this in the medical record. (Tr. 32:14-22).

10. At the hearing, Claimant testified that she injured herself at work several days ***prior*** to the November 6, 2020 incident. Claimant testified she and a coworker were lifting human remains and she felt a severe pain in her abdomen that caused her to go home for the day. According to Claimant, this injury occurred on or about October 30, 2020. (Tr. 31:8-13). Claimant further testified that this injury "started the process" and caused her pain. (Tr. 27:19-24).

11. Claimant testified that she told her supervisor about the alleged injury on or about October 30, 2020, but her supervisor did not report the injury. (Tr. 24:16-25:2).

12. The alleged injury on or about October 30, 2020 is not referenced in any of Claimant's medical records. The ALJ finds that Claimant did not tell any of her medical providers about the alleged injury on or about October 30, 2020.

13. TG[Redacted] is a claims adjuster for Sedgwick, CMS, the third-party administrator on this claim. Ms. TG[Redacted] took an initial statement from Claimant shortly after her November 6, 2020 alleged injury.

14. Ms. TG[Redacted] testified that when she specifically asked Claimant if she had any prior abdominal problems or hernias, Claimant told Ms. TG[Redacted] she had no prior hernias or abdominal pain. (Tr. 43:1-7). Claimant did not dispute this testimony.

(Tr. 33:4-9). Claimant further testified that she did not tell Ms. TG[Redacted] about the alleged work injury on or about October 30, 2020. (Tr. 33:12-19).

15. Ms. TG[Redacted] testified that because Claimant reported no prior hernias or abdominal symptoms, Respondents accepted the claim and admitted liability. (Tr. 43:20-23).

16. Claimant had abdominal issues in 2018. On August 24, 2018, after giving birth, Claimant underwent a post-partum tubal ligation that resulted in a large periumbilical hematoma. On December 21, 2018, Claimant was seen at Cornerstone Family Practice for abdominal pain. Claimant reported generalized abdominal pain, especially behind her umbilicus. (Ex. I).

17. On June 8, 2021, at Respondents request, John Burris, M.D., performed an independent medical examination. Claimant told Dr. Burris she had laparoscopic tubal ligation surgery in 2018. Dr. Burris noted in his report that Claimant denied any prior abdominal pain or problems or abdominal hernias. (Ex. A, p. 2). Claimant confirmed this, and testified she told Dr. Burris she did not have any prior abdominal pain or hernias. (Tr. 23:3-14).

18. Dr. Burris testified via deposition that umbilical hernias are usually a congenital defect, and a lifting mechanism of injury is not one of the risk factors for developing an umbilical or incisional hernia. (Burris Dep. 11:16-18). Adult risk factors that contribute to umbilical hernias include obesity, multiple pregnancies and previous abdominal surgeries, all of which Claimant has or has had. (Ex. A, p. 10; Burris Dep. 10:20-25 – 11:1-20).

19. Claimant's testimony regarding the timing and mechanism of her injury was inconsistent. The present claim is based on an alleged injury that occurred on November 6, 2020. Specifically, Claimant reported having abdominal pain after lifting a 67-pound bag. (Ex. B).

20. Claimant testified that on or about November 1, 2020, she lifted human remains and left work early after the event because of pain in her abdomen. (Tr. 25:7-21).

21. Claimant later testified at hearing that her abdominal pain began three days prior to the November 2, 2020 CT scan, which would be October 30, 2020. She further testified she believed the pain was due to a tubal pregnancy rather than a hernia. (Tr. 26:22-27:18).

22. On October 26, 2020, ten days prior to the alleged injury on November 6, 2020, Claimant had a well-woman examination where she reported having 9/10 left sided stomach pain that comes and goes. (Ex. D). Claimant testified she thought she may be pregnant, and Dr. Litchfield ordered a urine pregnancy test. But by November 6, 2020, Claimant knew she was not pregnant. (Ex. K).

23. The ALJ finds Claimant's timeline of events and mechanisms of injury to be inconsistent and lacking credibility.

24. After reviewing Dr. Burris's independent medical examination report, Claimant's ATP, Amanda Cava, M.D. agreed Claimant did not sustain a work-related injury on November 6, 2020. (Ex. B).

25. The ALJ finds that Claimant did not sustain a compensable work injury on November 6, 2020.

26. Ms. TG[Redacted] testified that she relied on Claimant's statement she had no prior abdominal problems or hernias to move forward with accepting the claim. Ms. TG[Redacted] testified that had she known about a preexisting condition, she would have requested prior medical records to make a determination regarding compensability. (Tr. 43:16-23, 44:2-7).

27. The ALJ finds that Claimant provided incomplete and materially false information to Respondents.

28. Ms. TG[Redacted] testified Respondents paid a total of $44,339.71 on this claim based on Claimant's representations. Of this amount, $8,796.48 were temporary total disability benefits and $35,543.23 were medical benefits. (Tr. 45:11-23).

29. Claimant testified that she has three different types of insurance and would not have committee fraud. (Tr. 4:1-6)

30. The ALJ finds that on multiple occasions, Claimant was not forthcoming regarding her past abdominal issues, particularly as they related to her 2018 tubal ligation and a possible pregnancy on October 26, 2020. Claimant was truthful in telling Ms. TG[Redacted] that she did not have a past history of hernias.

31. While Claimant knew by November 6, 2020 that she was not pregnant, the ALJ credits Claimant's testimony she did not know the results of her November 2, 2020 CT scan.

32. The ALJ finds that Claimant did not make a knowingly false representation with the intention that it be acted upon. Respondents did not prove by a preponderance of the evidence that Claimant had an intent to deceive and defraud Respondents.

CONCLUSIONS OF LAW

Generally

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

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

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

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

Compensability

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

As of November 2, 2020, four days before the alleged word-related injury, Claimant's CT scan indicated she had an umbilical hernia. On November 6, 2020, after Claimant reported abdominal pain after lifting a 67-pound bag, she went to Concentra for an evaluation. Claimant was diagnosed with an abdominal strain, and Ms. Tittelfitz ordered a CT scan of Claimant's abdomen. The November 6, 2020 CT scan showed "umbilical hernia unchanged from previous imaging." Thus, there is no causal nexus between Claimant's umbilical hernia and her alleged work injury on November 6, 2020. As found, Claimant did not sustain a compensable work-related injury on November 6, 2020. (Findings of Fact ¶ 25).

Withdrawal of Admissions

The beneficial intent of the Act is predicated on claimants providing accurate information. *Vargo v. Indus. Comm'n*, 626 P.2d 1164 (Colo. App. 1981). Therefore, when a claimant supplies materially false information upon which his employer and its insurer relied in filing an admission of liability, the court is justified in declaring the admission void *ab initio*. *Id.*; *Kraus v. Artcraft Sign Co.*, 710 P.2d 480 (Colo. 1985); *Lewis v. Scientific Supply Co., Inc.*, 897 P.2d 905 (Colo. App. 1995); *West v. Lab Corp. of America*, W.C. No. 4-684-982 (ICAO February 27, 2009). *Vargo* and *Lewis* stand for the proposition that the authority of an ALJ to remedy fraud is limited to the express provisions of the statute, except where the fraud occurs prior to entry of a final admission or closure of the claim by way of an order. In circumstances where no final adjudication has occurred, "retroactive withdrawal" is a permissible remedy. *Cf. Johnson v. Indus. Comm'n*, 761 P2d 1140 (Colo. App. 1988).

As found, Claimant told Ms. TG[Redacted] she did not have a history of abdominal pain and she did not have a history of hernias. But on October 26, 2020, less than two weeks before the alleged work-related injury, Claimant complained of abdominal pain at her well-woman examination, and Dr. Litchfield ordered a CT scan of her abdomen. On November 2, 2020, Claimant underwent a CT scan of her abdomen and pelvis that indicated she had a prominent umbilical and infraumbilical hernia. As found, Claimant did not know the result of her CT scan on November 6, 2020 when she was treated at Concentra and had another CT scan. Claimant did not tell Ms. TG[Redacted] about her appointment on October 26, 2020, where she complained of abdominal pain, nor did she tell her that she had a CT scan a few days prior. Claimant testified that she told the physicians at Concentra about the November 2, 2020 CT scan. Ms. TG[Redacted] credibly testified that had she known of Claimant's prior abdominal problems, she would have requested medical records to conduct a further investigation. As found, Respondents relied on the information provided by Claimant in filing the admission of liability. (Findings of Fact ¶ 26). Claimant omitted material facts regarding her recent appointment with Dr. Litchfield and the CT scan that was ordered because of her abdominal pain. (Findings of Fact ¶¶ 27 and 30).

As found, Claimant did not suffer a work-related injury. (Findings of Fact ¶ 25). Respondents have proven by a preponderance of the evidence that Claimant's medical condition and subsequent medical treatment were not work-related. Accordingly,

Respondents' admission of liability is void *ab initio*, and Respondents can withdraw the prior admission of liability.

Fraud

To prove fraud, a party must generally show the following: (a) a party made a false representation of a material fact; (b) the party knew that the representation was false; (c) that the person to whom the representation was made was ignorant of the falsity; (d) that the representation was made with the intention that it be acted upon; and (e) that the reliance resulted in damages to the plaintiff. *See Nelson v. Gas Research Institute*, 121 P.3d 340, 343 (Colo. App. 2005). The existence of these elements is generally a question of fact for determination by the ALJ. *See Vargo, supra*. Because proof of fraud is a factual issue, the ALJ may base her decision on inferences drawn from circumstantial evidence, as well as direct evidence. *See Elec. Mutual Liab. Insur. Co. v. Indus. Comm'n,* 391 P.2d 677 (1964). Insofar as the ALJ's inferences are supported by substantial evidence in the record they must be upheld on review. *May D & F v. Indus. Claim Appeals Office,* 752 P.2d 589 (Colo.App.1988); *Essien v. Metro Cab, Inc.*, W.C. No. 3-853-693 (I.C.A.O. Aug. 22, 1991)

It is undisputed that Respondents relied upon Claimant's assertion to Ms. TG[Redacted] that she did not have any prior abdominal pain or prior hernias in admitting liability on this claim without any further investigation, and paying medical benefit and temporary disability payments. (Findings of Fact ¶ 26). Respondents, however, have not proved by a preponderance of the evidence that the representation was made with the intention that it be acted upon. As found, Claimant testified that despite having a tubal ligation in 2018, she thought she may have had a tubal pregnancy, and she thought this was the source of her abdominal pain. (Findings of Fact ¶ 6). On October 26, 2020, Claimant was seen for a well-woman examination, and Dr. Litchfield ordered a urine pregnancy test. The ALJ credits Claimant's testimony that she thought she could possibly be pregnant, and thought that was why Dr. Litchfield ordered a CT scan of her abdomen and pelvis. (Findings of Fact ¶ 7).

As found, Claimant did not make a knowingly false representation with the intention that it be acted upon. (Findings of Fact ¶ 32). Claimant told Ms. TG[Redacted] that she never had a prior hernia nor abdominal pain. The ALJ infers that Claimant's response regarding abdominal pain related to any past hernias, not abdominal pain in general. Ergo, while Claimant omitted material facts regarding her October 16, 2020 well-woman examination and accompanying abdominal pain, the ALJ finds that Claimant did not do so with the intention that Respondents act upon false information. Respondents have failed to prove by a preponderance of the evidence that Claimant committed fraud.

Temporary Total Disability Benefits

To prove entitlement to temporary total disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, she left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §§8-42-(1)(g) & 8-42-105(4), C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323

(Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). As found, Claimant did not suffer a compensable work-related injury, thus she is not entitled to TTD benefits. Respondents paid Claimant $8,796.48 in TTD benefits. Claimants must reimburse Respondents in the amount of $8,796.48.

Respondents are asking for a payment of $500 per month from Claimant until the benefits are fully repaid. The Colorado Court of Appeals has held that ALJs have discretion to fashion such a remedy with regard to overpayments. *See Turner v. Chipotle Mexican Grill*, W.C. No. 4-893-631-07 (I.C.A.O. Feb. 8, 2018), *citing Simpson v. Indus. Claim Appeals Offi*ce, 219 P.3d 354 (Colo. App. 2009; *see also Arenas v. Indus. Claims Appeals Office*, 8 P.3d 558 (Colo. App. 2000); *see Louisiana Pacific Corp v. Smith*, 881 P.2d 456 (Colo. App. 1994). There is no evidence in the record regarding Claimant's ability to pay Respondents $500 per month. The ALJ finds that payments of $200 per month are reasonable.

ORDER

It is therefore ordered that:

1. Claimant did not sustain a compensable work-related injury on November 6, 2020.

2. Respondents may withdraw the prior admission of liability.

3. Claimant must reimburse Respondents for the temporary disability benefits issued on this claim in the amount on $8,796.48 as she did not sustain a compensable work-related injury on November 6, 2020.

4. Claimant shall pay Respondents $200 per month.

5. Respondents failed to prove by a preponderance of the evidence that Claimant committed fraud.

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

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

DATED: September 21, 2022

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-149-765-003

ISSUES

The issues set for determination included:

- Did Respondents overcome the opinion of Division of Workers' Compensation IME ("DIME") physician (Miguel Castrejon, M.D.) by clear and convincing evidence that Claimant was not at MMI?

- Did Claimant overcome the opinion of Dr. Castrejon by clear and convincing evidence that his left knee condition and need for further treatment was not causally related to the October 2, 2020 date of injury?

- Did Respondents proved by a preponderance of the evidence that Claimant's average weekly wage ("AWW") should be reduced from $1,405.44 to $715.49 for purposes of future indemnity benefits awarded?

- Is Claimant entitled to temporary total disability ("TTD") benefits beginning June 11, 2021 and continuing as permitted by statute?

- Did Claimant prove by a preponderance of the evidence that Jay Lorton, M.D. is an authorized treating provider?

- Did Claimant prove by a preponderance of the evidence that he requires further medical treatment for left shoulder, left knee, left hip, and/or fractured femur as reasonably and necessarily related to the October 2, 2020 date of injury?

- Is Claimant entitled to disfigurement benefits.[1]

PROCEDURAL STATUS

A Summary Order was issued by the ALJ on July 22, 2022 and served on August 12, 2022. On July 29, 2022, Respondents requested a full Order. An Order granting an extension of time to submit Amended Findings of Fact, Conclusions of Law and Order was granted. Claimant and Respondents filed Amended Proposed Findings of Fact, Conclusions of Law and Order on August 22, and 23, respectively. This Order follows.

[1] A separate Order awarding disfigurement benefits was issued on May 3, 2022.

FINDINGS OF FACT

1. Claimant worked for Respondent-Employer as an over the road truck driver. Claimant testified he is sixty-seven years old is a 6'-7" tall and weighed 345 pounds.

2. Claimant's medical history was significant in that he suffered an injury to his left knee and leg on September 28, 2020. Claimant treated at St. Joseph Hospital at Medical Center in Phoenix and the CT scan showed no evidence of fracture or dislocation, but circumferential subcutaneous edema was present. Severe osteoarthritis was also present in the left knee. Claimant was offered a knee immobilizer and Tauruna Ralhan, M.D. recommended Claimant follow up with an orthopedist for further management of the knee pain.

3. There was no evidence in the record that Claimant required additional treatment for this injury or had work restrictions related to it.

4. Claimant also had preexisting conditions which included diabetes mellitus and morbid obesity.[2]

5. Claimant's taxable earnings through September 27, 2020 totaled $9,301.32. Claimant received a $63.00 per diem from Respondents for meals and other incidentals. DS[Redacted], who testified for Employer, confirmed the $63.00 was not included in Claimant's taxable income reported to the IRS.[3]

6. Claimant's per diem payment should not be included in his AWW since it was not included in his taxable income.

7. On October 2, 2020, Claimant suffered an admitted industrial injury when he fell while exiting his truck. Claimant missed a step and his left foot got caught in the grab bar, which broke his femur. Claimant testified that he thought he reinjured his left knee on October 2, 2020.

8. Claimant was treated in the Emergency Department at Denver Health and underwent a closed reduction percutaneous screw fixation of the left distal femur. Claimant was hospitalized through October 13, 2020. In a treatment note, dated October 8, 2020, the occupational therapist documented Claimant reported left arm weakness.

9. Additional diagnoses at time of Claimant's discharge included: acute hyperkalemia – resolved; CKD II; Diabetes Mellitus Type 2; bilateral lower extremity erythema; hypertension; morbid obesity; diabetic skin ulcer on the left foot; peripheral neuropathy; spina bifida; left lower extremity edema; and lower extremity cellulitis. The

[2] Exhibit J, p. 39.

[3] Exhibit F.

discharge records made no mention of symptoms or diagnoses related to Claimant's left ankle, left hip, or left shoulder. Claimant was discharged with a wheelchair.

10. A General Admission of Liability ("GAL") was filed on behalf of Respondents on or about October 16, 2020. The GAL admitted for TTD benefits paid at a rate of $936.95 per week, based upon an AWW of $1,405.44 per week.

11. Claimant testified he did not have separate residence and used his truck as his residence. Ms. DS[Redacted] confirmed Claimant drove a company-owned truck. Claimant testified he no longer had use of the truck after his injury. After his injury, Claimant was living at a Days Inn motel and he testified the cost was $68.11 per day.

12. The ALJ concluded the cost of the Claimant's motel should be included in the AWW. The cost of this housing was $476.77 per week ($68.11 x 7 days).

13. Claimant underwent rehabilitation at Sloan's Lake Rehabilitation and was then evaluated by ATP, Patrick Antonio, D.O. on December 10, 2020. Dr. Antonio's impression was femur fracture, left; status post-surgery. Dr. Antonio's treatment notes on January 7, February 4 and February 8, 2021; all referenced left arm/left shoulder pain and discomfort. Claimant received treatment to those areas of the body. The February 4 note reflected the fact Claimant was still wheel chair bound.

14. Claimant was evaluated by John Schwappach, M.D. at Denver Metro Orthopedics on January 11, 2021 evaluated Claimant's left hip and knee. Dr. Schwappach noted Claimant was making slow progress with rehabilitation and he noted interval healing of the left femur fracture. Dr. Schwappach diagnosed Claimant with severe end-stage arthritis of the left knee and noted left shoulder complaints. Dr. Schwappach was going to refer claimant to a physiatrist. PT was noted at progressive mobilization, upper body strength and strengthening of the affected extremity. The ALJ inferred Claimant reported pain in those areas of his body, which prompted Dr. Schwappach to evaluate same.

15. Dr. Schwappach evaluated Claimant on February 8, 2021, at which time Claimant reported the sensation of movement in his left knee, as well as pain in the left shoulder. A left shoulder subacromial steroid injection was performed Dr. Schwappach noted Claimant should be weight-bearing and continue with active/passive range of motion ("ROM") of the left knee.

16. On March 8, 2021, Claimant returned to Dr. Schwappach, who noted that Claimant had severe end-stage arthritis in the left knee and a total knee replacement procedure was not possible until Claimant was no longer using a wheelchair and could ambulate up and down the hall twice.

17. On April 13, 2021, Claimant was evaluated by Dr. Antonio for a recheck of left shoulder pain. Claimant was referred to an orthopedic specialist for second opinion regarding left shoulder and left knee/femur.

18. Claimant underwent an MRI of his left shoulder on April 16, 2021 and the films were read by Trystain Johnson M.D. Dr. Johnson's impression was: (allowing for the motion artifact) suspect high-grade partial bursal sided tear near the distal anterior insertion of the supraspinatus, with more diffuse tendon strain and intrasubstance degeneration. Supraspinatus muscle belly edema also associated, subscapularis and infraspinatus tendinosis and articular sided fraying without tear. Chondromalacia was noted along the anterior glenoid and superior humeral head, with associated joint effusion and mild synovitis without loose body evident. Some posterior inferior capsular edema could be chronic capsulitis versus a sprain. The ALJ found the MRI provided objective evidence of what was causing symptoms in the left shoulder.

19. Claimant retuned to Dr. Antonio on April 30, 2021 who noted the referral to Dr. Hewitt for orthopedic second opinion has not occurred yet. Claimant states lateral shoulder pain is worse with movement and left knee/hip pain as well, even with movement in bed causing sharp pain. Claimant wanted to continue physical therapy and was still in a wheelchair.

20. On May 20, 2021, Claimant was evaluated by Lawrence Lesnak M.D., at the request of Respondents. At that time, Claimant complained of nearly constant left anterior shoulder pain and left axillary pain, as well as severe left anterior knee pain. Dr. Lesnak stated there was no evidence of specific knee joint effusion on exam; there was evidence of moderate bilateral knee joint crepitus, with passive range of motion ("ROM"), although knee joint instability was not present. Claimant was described as having good, pain-free, ROM of his cervical and thoracic spine, which was limited due to body habitus. Limitations in left shoulder ROM were noted. Moderate to severe muscle atrophy involving the left first dorsal interosseous muscle was present.

21. Dr. Lesnak's impressions were: subjective complaints of left anterior axillary pains with no current clinical evidence of specific left shoulder impingement syndromes; possible probable symptomatic left shoulder osteoarthritis/degenerative changes; subjective complaints of left anterior knee pains-probable symptomatic left knee osteoarthritis/degenerative changes; acute left mid-distal femoral shaft fracture with a non-displaced fracture line extending into the left femoral intercondylar region; chronic right knee, as well as right greater than left foot and ankle pains; polyarthritis; chronic right ulnar forearm and right ulnar hand numbness-chronic ulnar neuropathy.

22. Dr. Lesnak opined that none of Claimant's current complaints were related to the occupational injury that occurred on October 2, 2020. Dr. Lesnak stated Claimant's acute left mid-distal femur fracture was causally related to the occupational incident, however, the severe/advanced left knee osteoarthritis and any symptomatic left shoulder joint pathology was unrelated to the occupational incident. Dr. Lesnak also noted Claimant was morbidly obese, with a history of chronic untreated diabetes mellitus, hypertension, obstructive sleep apnea, and peripheral neuropathies, as well as what appeared to be chronic left ulnar neuropathy. Dr. Lesnak stated Claimant was at MMI.

23. Claimant was evaluated by Dr. Antonio on June 11, 2021. Claimant expressed a concern that he was still in a wheelchair and unable to walk without significant discomfort and instability. He also reported that his shoulder occasionally popped. He had limited use of the left arm. Dr. Antonio placed Claimant at MMI after receiving Dr. Lesnak's IME report. Dr. Antonio agreed with Dr. Lesnak that the left femur fracture was the only medical condition related to the October 2, 2020 date of injury and Claimant had no permanent impairment. Claimant was released to full duty. This occurred before the DIME was performed.[4]

24. There was no evidence in the record that Claimant has worked since his injury.

25. A Final Admission of Liability ("FAL") was filed on behalf of Respondents on or about July 2, 2021. The FAL (undated) admitted for TTD benefits from October 3, 2020 through June 10, 2021 and the 0% medical impairment rating issued by Dr. Antonio.

26. On July 20, 2021, Claimant was evaluated at the Carillion Clinic in Virginia by Thomas Shuler, M.D. for left shoulder and left knee pain. Dr. Shuler noted Claimant was injured at work in October 2020 and his medical issues were complicated. Dr. Shuler characterized Claimant's left shoulder problems as chronic since his work-related accident.

27. Dr. Shuler opined Claimant had adhesive capsulitis and he would need to work on ROM and strengthening. Dr. Shuler recommended physical therapy and felt if he could get his motion back, he could consider arthroscopy. Regarding Claimant's left knee, significant osteoarthritis was present, particularly in the medial compartment. Dr. Shuler did not believe Claimant was a candidate for a total knee replacement, as his femur was not fully healed. Claimant would also need the femoral rod removed prior to any surgery on the knee. Dr. Shuler administered cortisone injection to the left knee at this visit.

28. On October 14, 2021, Claimant underwent a DOWC-sponsored IME, which was performed by Miguel Castrejon, M.D. At that time, Dr. Castejon noted Claimant was using a wheelchair and exhibited very poor balance, with a positive rhomberg test. The examination of the left shoulder revealed trapezius and rhomboid tenderness, but no muscle atrophy. Claimant was tender over the anterior capsule and AC joint, with limited ROM in the left shoulder. On examination of the left hip, mild trochanteric pain was noted, with no evidence of instability or impingement. The examination of the left knee revealed in the absence of effusion, with ROM 15 to 170°. Tenderness was present with lateral femoral condyle, with pain on patellar compression. Dr. Castrejon concluded Claimant was not at MMI with regard to the left shoulder and left hip.

[4] Exhibit M, pp. 67-69. There was no evidence Dr. Antonio evaluated the physical requirements of Claimant's job.

29. Dr. Castrejon specifically analyzed the issues of whether Claimant's left shoulder and left hip were related to the October 2, 2020 work injury, including a discussion of the anatomic structures involved.[5] Dr. Castrejon opined there was no direct injury to the left hip, but Claimant developed left trochanteric bursitis secondary to prolonged immobilization and sitting. Dr. Castejon concluded Claimant had a diagnosis of left shoulder impingement related to muscle weakness and instability that led to a decrease in the subacromial space, which caused the impingement. Dr. Castrejon opined Claimant's left shoulder condition was a compensable consequence of the industrial event for which medical treatment is indicated. The ALJ credited the opinion of Dr. Castrejon with regard to the relatedness of Claimant's left shoulder and left hip.

30. Dr. Castrejon diagnosed left knee osteoarthritis, which was characterized as nonindustrial. Dr. Castrejon noted there were questions regarding the left knee, including the x-ray form the September 29, 2020 injury, which possibly showed an underlying insufficiency fracture. There was also a note that Claimant had a torn meniscus, with a surgical repair, although this was not reported by Claimant. Dr. Castrejon concluded that Claimant's left knee condition was not worsen ed by the knee injury.

31. Dr. Lesnak issued a supplemental report after reviewing Dr. Castrejon's DIME report and concluded the Claimant was at MMI with no impairment related to the work injury. Dr. Lesnak's expert testimony was consistent with his previous reports. The ALJ determined Dr. Lesnak's opinion differed from Dr. Castrejon's and was less persuasive.

32. The evidentiary deposition of Dr. Lesnak occurred on March 9, 2022. Dr. Lesnak testified there was no evidence that Claimant sustained a left shoulder injury as a result of the industrial event. He testified that Dr. Castrejon noted Claimant did not report left shoulder symptoms until five weeks after the date of injury. Dr. Lesnak further testified that the left shoulder MRI scan demonstrated a bursal-sided tear which is a chronic degenerative condition.[6] Dr. Lesnak testified that Claimant's co-morbid conditions including polyarthritis, morbid obesity, diabetes, and degeneration in multiple other joints wholly support a finding that Claimant's left shoulder condition was not causally related to the October 2, 2020 date of injury. Dr. Lesnak stated that the medical evidence in the records did not support DIME Dr. Castrejon's opinion that the left shoulder symptoms and pathology were related to the October 2, 2020 date of injury. Dr. Lesnak's opinion diverged from Dr. Castrejon.

33. Regarding the diagnosis of left hip trochanteric bursitis, Dr. Lesnak testified that the two most common medical tests utilized for a diagnosis are the Ober's test and the FABER test. Dr. Lesnak stated Castrejon did not document using either of these tests during his evaluation of Claimant.[7] Dr. Lesnak testified that a greater trochanteric bursitis

[5] Exhibit N, pp. 87-89.

[6] Lesnak deposition p. 15:7-18.

[7] Lesnak deposition. p. 22: 24-25; p. 23, 1-25; p. 24, 1-11.

would not have been caused by the femur fracture. Rather, it is generally caused by repetitive motions, such as running. Dr. Lesnak stated that Claimant's sitting in a wheelchair was not a repetitive motion such that it caused the tendon to slide back and forth over the bony prominence of the bursa. Dr. Lesnak testified that to the contrary, individuals with greater trochanteric bursitis are recommended to perform more seated activities.

34. Neither Claimant nor Respondents proved that Dr. Castrejon's opinions were more probably wrong with regard to the issues of MMI and causation, respectively.

37. The ALJ concluded Claimant's left shoulder and hip, both of which had degenerative changes, were worsened by the October 2, 2020 work injury.

38. Claimant moved to Oklahoma and was evaluated by Jay Lorton, M.D. on December 21, 2021. Claimant testified Dr. Lorton had treated a friend. There was no evidence in the record that an ATP initially referred Claimant to Dr. Lorton. Dr. Lorton noted a history of left shoulder area pain since October 2020 when he slipped and fell getting out of his tractor-trailer truck. Dr. Lorton ordered an MRI.

39. On January 5, 2022, Claimant underwent an MRI of the left shoulder and the films showed: moderate to severe supraspinatus tendinosis with a very small interstitial split supraspinatus tendon footprint. Thin interstitial split posterior fibers supraspinatus tendon were located medial to its footprint. Moderate infraspinatus and subscapularis tendinosis; minimal subacromial subdeltoid bursitis and mild subcoracoid bursitis were all present. Mild degeneration was seen in the superior labrum, with thickening and scarring in the inferior glenohumeral ligament. The long head biceps tendon was intact and severe acromioclavical joint arthrosis with moderate to severe narrowing of the anteromedial aspect of the supraspinatus outlet was present along with Os acromiale (normal variant) with thin trace fluid in the synchondrosis. The ALJ found the MRI showed objective evidence of pathology in the left shoulder.

40. Claimant was evaluated by Nancy VanderMolen, D.O. at Concentra on January 21, 2022. The record contained two referrals from Dr. VanderMolen (who is an ATP), one of which was to Dr. Labutti at Advanced Orthopedics, the other was to Dr. Lorton at Advanced Orthopedics. The referral was at Claimant's request. Both referrals were dated January 21, 2022.[8]

41. On January 26, 2022, Claimant underwent left shoulder arthroscopic surgery, which was performed by Dr. Lorton. There was no evidence in the record that authorization was sought before the surgery was performed.

42. The ALJ concluded Claimant's left shoulder and hip, both of which had degenerative changes, were worsened by the October 2, 2020 work injury.

[8] Exhibit 37, pp. 226-227.

43. Dr. Castrejon's evaluation occurred after Dr. Antonio returned Claimant to work with no restrictions. Since Claimant is not at MMI (as found by Dr. Castrejon), he is entitled to TTD benefits.

44. Dr. Lorton is an ATP.

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

CONCLUSIONS OF LAW

General

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

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). The ALJ must make specific findings only as to the evidence found persuasive and determinative. An ALJ "operates under no obligation to address either every issue raised or evidence which he or she considers to be unpersuasive". *Sanchez v. Indus. Claim Appeals Office of Colo.*, 411 P.3d 245, 259 (Colo. App. 2017), citing *Magnetic Engineering Inc. v. Indus. Claim Appeals Office*, *supra*, 5 P.3d at 389.

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

AWW

As determined in Findings of Fact 7-9, Claimant suffered an admitted industrial injury on when he broke his femur. Claimant required emergency medical treatment for the fracture including surgery. *Id.* Respondents admitted for the injury and a dispute arose concerning AWW. The ALJ determined the AWW issue implicated both § 8-42-102(2), C.R.S. and § 8-40-201(19)(b) , C.R.S. The former provides: "Average weekly wages for the purpose of computing benefits provided in articles 40 to 47 of this title, except as provided in this section, shall be calculated upon the monthly, weekly, daily, hourly, or

other remuneration which the injured or deceased employee was receiving at the time of the injury, and in the following manner; except that any portion of such remuneration representing a per diem payment shall be excluded from the calculation unless such payment is considered wages for federal income tax purposes".

§ 8-40-201(19)(b), C.R.S provides "the term wages includes the amount of the employees cost of continuing the employers group health insurance plan…and the reasonable value of board, rent, housing, and lodging received from the employer, the reasonable value of which shall be fixed and determined from the facts by the division in each particular case, but does not include any similar advantage or fringe benefit not specifically enumerated in this subsection (19)".

In the case at bar, Claimant sought a higher AWW, as he lost the use of his truck after his injury. Respondents correctly argued Claimant's per diem should not be included in the AWW. However, the ALJ determined the cost of Claimant's lodging should be included in his AWW, as he was provided a truck with a sleeper by Employer. (Finding of Fact 11). Claimant testified he did not have a separate residence and after the work injury he has been staying at a motel. *Id.* The only evidence in the record of the value of said lodging was Claimant's testimony. The Colorado Court of Appeals decision in *Western Cultural Resource Mgt v. Krull,* 782 P.2d 870, 871 (Colo. App. 1989) is apposite to this question.

The ALJ found Claimant's AWW calculation should include the cost of housing which is $476.77 per week ($68.11 x 7). (Finding of Fact 12). The ALJ agreed with Claimant's calculation: his AWW of $715.49 plus $476.7 totals $1,192.26. *Id.* Inclusion of the cost of housing achieves the overall objective in calculating the AWW, which is to arrive at a fair approximation of Claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993); *Avalanche Industries v. ICAO*, 166 P.3d 147 (Colo. App. 2007)

Respondents argued in their Amended proposed Order that Claimant's AWW should remain at the higher rate until Claimant obtains personal housing. Once Claimant obtained personal housing, Respondents asserted his average weekly wage should return to $715.49 per week. No authority was cited in support for this argument and the ALJ will not include it in the Order. However, this is without prejudice for Respondents to request a hearing on the issues of modifying or reopening Claimant's AWW, should Claimant's circumstances change.

Overcoming the DIME

In resolving the issues, the ALJ noted the question of whether Claimant overcame Dr. Castrejon's opinion is governed by §§ 8-42-107(8)(b)(III) and (c), C.R.S. *Peregoy v. Indus. Claim Apps. Office*, 87 P.3d 261, 263 (Colo. App. 2004). These sections provide that the finding of a DIME physician selected through the Division of Workers' Compensation shall only be overcome by clear and convincing evidence. § 8-42-107(8)(b)(III), C.R.S.; *Leprino Foods Co. v. Indus. Claim Appeals Office*, 134 16 P.3d 475,

482-83 (Colo. App. 2005); *accord Martinez v. Indus. Claim Appeals Office*, 176 P.3d 826, 827 (Colo. App. 2007).

Clear and convincing evidence is highly probable and free from serious or substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995). The mere difference of medical opinions does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAO July 19, 2004).

In the case at bar, the ALJ determined that Respondents did not meet their burden of proof to overcome Dr. Castrejon's opinion that Claimant was not at MMI and that his hip and shoulder condition were related to the work injury. The ALJ credited Dr. Castrejon's opinion and determined the hip and shoulder were worsened by the industrial injury. (Finding of Fact 42). As found, Respondents offered Dr. Lesnak reports and expert testimony to controvert the conclusions of Dr. Castrejon. (Findings of Fact 20-22, 34-35). The ALJ determined this medical evidence constituted a differing opinion and did not meet the clear and convincing evidentiary standard to overcome the DIME's opinion. (Findings of Fact 36).

Likewise, Claimant argued that his knee condition was related to the injury and testified that he thought his left knee was worsened by his injury on October 2, 2020. (Finding of Fact 7). The ALJ found insufficient evidence was adduced by Claimant overcome Dr. Castrejon's opinion regarding his left knee. (Finding of Fact 36). Claimant did not meet did not meet the clear and convincing evidentiary standard to overcome the DIME's opinion.

Medical Benefits-Authorization

Authorization to provide medical treatment refers to a medical provider's legal authority to provide medical treatment to Claimant with the expectation that the provider will be compensated by the insurer for treatment. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *In re Bell*, W.C. No. 5-044-948-01 (ICAO, Oct. 16, 2018). Authorized providers include those medical providers to whom Claimant is directly referred by the employer, as well as providers to whom an ATP refers the claimant in the normal progression of authorized treatment. *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997).

Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *Kilwein v. Indus. Claim Appeals Office,* 198 P.3d 1274, 1276 (Colo. App. 2008); *In re Bell*, W.C. No. 5-044-948-01 (ICAO, Oct. 16, 2018); *In re Patton*, W.C. Nos. 4-793-307 and 4-794-075 (ICAO, June 18, 2010). In this case there was a dispute as to the propriety of the referral to Dr. Lorton.

Claimant admitted that he got the name of Dr. Lorton from a friend. (Finding of Fact 38). Subsequently he was referred to Dr. Lorton by Dr. VanderMolen. (Finding of Fact 40). Dr. VanderMolen is presumed to have exercised her independent medical judgment and the referral was not negated simply because Claimant got the name of Dr. Lorton from a friend. Under these facts, the ALJ concluded Respondents are required to pay for the medical treatment recommended by ATP, Dr. Lorton (and all referrals from him) as he was an ATP. (Finding of Fact 44). This did not include the surgery performed by Dr. Lorton for which authorization was not sought before the procedure. (Finding of Fact 41).

TTD Benefits

Respondents argued that the return to regular work by Dr. Antonio precluded the claim for TTD benefits. TTD benefits shall continue until the first occurrence of any of the following: "(1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment". § 8-42-105(3)(a-d), C.R.S.

On June 11, 2021, Dr. Antonio returned Claimant to work, with no restrictions. (Finding of Fact 23). The ALJ found that this return to work occurred before the DIME evaluation. *Id.* Dr. Castrejon's conclusion that Claimant was not an MMI was later in time and on this basis, the ALJ concluded Claimant was entitled to TTD benefits. (Finding of Fact 43).

ORDER

It is therefore ordered:

1. Respondents shall pay for reasonable and necessary medical treatment for Claimant to cure and relieve the effects of his shoulder, femur and hip injury.

2. Respondents shall pay for medical benefits provided by Dr. VanderMolen.

3. Claimant's request that Respondents pay for the shoulder surgery is denied and dismissed.

4. The ALJ found Dr. Lorton was an ATP after the referral on January 21, 2022 by Dr. VanderMolen. Respondents shall pay for reasonable and necessary medical treatment provided by Dr. Lorton (and his referrals), pursuant the Colorado Workers' Compensation Medical Fee Schedule.

5. Claimant's AWW is increased to $ 1,192.26 per week.

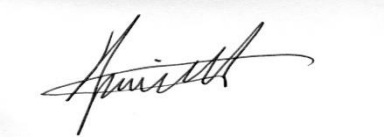
6. Respondents shall pay TTD benefits in the amount of $794.84 per week from June 11, 2021 to ongoing, until terminated by law.

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

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

DATED: September 21, 2022

STATE of COLORADO



Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts

ISSUES

Two separate claims were consolidated for purposed of hearing and judicial economy:

Issue with regard to W.C. No. 5-153-595-002, Date of Injury (DOI) October 23, 2020:

I. Whether Respondents have overcome the DIME physician's opinion with regard to the impairment provided in this matter.

Issues with regard to W.C. No. 5-184-071-002, DOI September 1, 2021:

II. Whether Claimant has proven by a preponderance of the evidence that Claimant was injured in the course and scope of his employment with Employer and if this claim is compensable.

If the September 1, 2021injury is compensable, then:

III. Whether Claimant has proven by a preponderance of the evidence that he is entitled to reasonably necessary medical benefits related to the alleged injury of September 1, 2021.

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

V. Whether Respondents have proven by a preponderance of the evidence that Claimant was terminated for cause.

VI. Whether Claimant has proven by a preponderance of the evidence the amount of Claimant's average weekly wage applicable to a September 1, 2021 claim.

STIPULATION OF THE PARTIES

At the commencement of the hearing Respondents advised that they were no longer wishing to litigate the issue of impairment or challenge the Division Independent Medical Examination (DIME) physician, Dr. Anjmun Sharma's opinion in the hernia claim for October 25, 2020, W.C. No. 5-153-595-002. Respondents offered to stipulate to filing a Final Admission of Liability consistent with Dr. Sharma's DIME report and Claimant accepted the stipulation.

FINDINGS OF FACT

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

Case Number WC 5-153-595-002, for date of injury of October 23, 2020:

1. Claimant was a mechanical service technician for Employer since sometime in 2018 or 2019 and was 54 years old at the time of the hearing.

2. Respondents filed a General Admission of Liability on January 25, 2021 in the October 23, 2020 work related injury where Claimant injured his abdomen, causing a hernia. Claimant injured his abdomen when going up a ladder while carrying a second ladder, in order to reach a compressor that required a double ladder set up.

3. Claimant was placed at maximum medical improvement on August 30, 2021 by Dr. Scott Richardson, without restrictions, as Claimant had full function, and required no further medical intervention following surgical repair of the left abdominal hernia.

4. The parties proceeded through a DIME process, as Requested by Claimant, with Dr. Anjmun Sharma. Dr. Sharma issued a report dated July 28, 2021 stating that Claimant's impairment for his October 23, 2020 work related abdominal ventral hernia was 13% whole person impairment. Respondents withdrew the issue of challenging the DIME physician's report by clear and convincing evidence, and agreed that Respondents would file a Final Admission of Liability consistent with Dr. Sharma's report. This ALJ approves the above stipulation of the parties in W. C No. 5-153-595-002.

Case Number WC 5-184-071-002, for date of injury of September 1, 2021

5. On September 1, 2021, Claimant was working on the roof of a building, replacing a fan motor of a condenser. He climbed up to the roof by ladder. A portion of the roof was pitched (slanted slope) and then the condenser was on a flat part of the roof further up. When he was standing on the pitched portion of the roof with his left foot, in the process of stepping onto the flat portion of the roof with his right foot, Claimant twisted his left knee and felt a pop. At that point, his left knee twisted while his left foot was planted on the 8 or 9 pitched roof, which was approximately a 36 to 38 degree pitch, causing a popping in his left knee. He was carrying a condenser part and his tools at the time. Claimant stated that all his weight was on the left leg because he had lifted his right foot to step from the pitched area to the flat roof area.

6. Claimant stated that something snapped in his knee. Claimant did not feel immediate pain but by approximately 30 minutes later, the pain in his knee started to intensify on top of the knee as well as inside and on the outer portion of his knee. Initially he thought he might have pulled a muscle. Since he was on the last job of the day, Claimant went home, thinking he would sleep on it and see how he was feeling in the morning. But his knee continued to hurt and swelled up, with a horseshoe swollen area above the knee cap. He reported the injury the following day and was sent for a drug test that day at Concentra.

7. Claimant had a right knee injury. in approximately 2014 while in a walk in cooler, banging his knee in the cooler, causing a meniscus bruise. He had conservative care, with some time off. The problem resolved.

8. Claimant stated that he had never been diagnosed with arthritis, to his knowledge, before this September 2021 injury.

9. After Claimant reported the injury, he was sent to Concentra for a drug test on September 2, 2021, but he was not evaluated for the knee condition.

10. Claimant was first evaluated for the left knee injury on September 9, 2021 at Concentra Medical Center by Scott Richardson, M.D. Dr. Richardson took a brief history but failed to investigate or go into the mechanics of the actual injury. He diagnosed a left knee strain. He prescribed antiinflamatories medication, and referred Claimant to physical therapy. Dr. Richardson restricted Claimant to temporary restrictions, occasionally lifting & carrying up to 20 lbs. and frequently lifting up to 10 lbs.; no use of ladders, no kneeling, no squatting, sitting 50% of the time, may be on feet up to 15 minutes at a time and use cane as needed.

11. Dr. Richardson's records are somewhat contradictory. Under chief complaint he noted that Claimant "started experiencing "popping" in the left knee while working in 9.1.2021." Then he goes on to state "[T]he next day he started experiencing swelling and pain as well." However, in the history of present illness he noted that Claimant noticed that on the date of injury he had a "gradual onset of diffuse pain in his left knee with popping." The latter indicates that Claimant was experiencing the pain on the date of the injury itself. Under the review of systems, Dr. Richardson noted that Claimant had joint pain, muscle pain, joint swelling, joint stiffness and limping. Yet in the physical exam he found no swelling of the left knee. He did ultimately opine that Claimant's objective findings were consistent with the history and/or work-related mechanism of injury and illness.

12. On September 14, 2021 Dr. Richardson documented that Claimant had the following history of present illness:

> 9/14/21:
>
> Left knee is doing better.PT X 1-helped.Taklng OTC Aleve 2 tabs-only twice so far. Did not gel Rxs. Occas. click/pop in the knee. Some constant dull ache. Limping less. Stopped using cane today. SI. Upper calf pain. No knee swelling. No fevers, SOB or CP. Work restrictions were the same.
>
> Initial visit: 9/9/21: DOI: 9/1/21:
>
> On 9/1 working as a HVAC technician he noticed a gradual onset of diffuse pain in his left knee with popping (states no prior popping in the knee). No specific injury but he was going up/down a ladder quite a bit plus kneeling and squatting and carrying 20-30 pounds at times. He noticed swelling in the knee later in the day. There has been a constant ache in the knee since then. The swelling comes and goes. Increased pain after being on his feet for a while. Flexion of the knee hurts. Ice and elevation have helped. … He denies prior injury to the knee. Some limping-he has a cane to use. Right knee had a work related injury in 2016-states he had an MRI-"bruised meniscus", says they wanted to replace the knee-had PT but no surgery and gets occas. pain in the right knee.

13. Claimant disagreed with the notation that there was "No specific injury" in this matter. Claimant stated that he was on the incline of the roof putting all his body weight on his left leg, twisting while holding the parts and his tools, and lifting his right leg to make a step, when he heard the left knee pop. He had swelling and gradual pain increase after some 30 minutes.

14. Claimant also disagreed that he provided any history regarding prior injuries to his left knee, only the right knee. He stated that he was never advised that he had arthritis prior to this work injury or that anyone had ever made a recommendation with regard to a knee replacement surgery of the right knee. He explained that he was advised, when he was being seen for the right knee about possible treatment that might be needed and a right knee replacement might be one of those possible treatments, but the right knee condition resolved with rest and physical therapy.

15. The same work restrictions continued through October 7, 2021 when Claimant was referred for the MRI. Neither party submitted any further records from the authorized treating providers at Concentra. This ALJ inferred that Claimant failed to attend any further appointments or that Respondents denied the claim at that time.

16. Claimant was not offered modified employment except for a short period of time of approximately three to four weeks when he performed work delivering parts to other technicians.

17. Claimant had an MRI on December 17, 2021, which was read by radiologist Elizabeth Young, M.D. The MRI showed a horizontal tear of the medial meniscal body and posterior horn. There was a flipped meniscal fragment in the intercondylar notch with a radial tear at the posterior horn root junction. Claimant also had patellofemoral and medial tibiofemoral compartment chondrosis.[1]

18. Claimant stated that he received a letter from a company he did not recognize, which terminated him as of January 10, 2022. Claimant testified that the modified duty running parts was no longer available. He received two other letters, one dated November 17, 2021 and a second one dated December 27, 2021,[2] which stated that he, or someone on his behalf, had submitted for a leave of absence. However, Claimant was emphatic that he did not make the request, that likely someone from Employer's Human Resource Department had made the request.

19. Claimant also had shown the letters to his supervisor, and was advised by his supervisor not respond to them because he was an employee that was supposed to be on workers' compensation. He also did not recognize the group that sent the three letters to him as part of Employer's organization. He stated that his supervisor had received his work restrictions and knew he was under restrictions by the workers' compensation doctor. As found by this ALJ Respondents have failed to establish that Claimant committed a volitional act, or exercised some control over the termination as Claimant was fully relying on his supervisor's instructions in this matter. Claimant did not precipitate the employment termination by a volitional act that he would have reasonably expect to cause the loss of his employment.

20. Based on the letter dated November 17, 2021, that states that Claimant or someone on his behalf submitted for leave of absence as of November 8, 2021, it was inferred that the last day Claimant may have performed any work for Employer was likely November 7, 2021.

[1] Pre-arthritic or arthritic condition of the knee.
[2] Respondents' Supplemental Exhibit, Exhibit K

21. On May 17, 2022 Dr. Sander Orent issued a report following his independent medical evaluation at Claimant's request. He took an extensive history, which was consistent with Claimant's account of the mechanism of the accident. He stated that Claimant was on an angled roof, twisting around the area to a flat portion where the condenser, he was working on, rested. This was the last job of the day so he finished and went home, thinking that it would be better in the morning. However, he woke up in significant pain and reported the work injury to his employer. He had the drug screen done and had to wait a week to get in to see any provider for his work related injury. Dr. Orent documented that Claimant had constant pain in the left knee, even walking to the trash bin or to get the mail, and would wake him up from a sound sleep. Dr. Orent specifically noted that Claimant had never had a history of left knee pain.

22. On physical exam, Dr. Orent found that Claimant's quadriceps on the left leg was atrophied both on the medial lateral and anterior belly. He noted effusion of the knee joint but not a tensor fusion but some fluid in the joint with tenderness on palpation across the joint line. He also noted a positive Apley's and McMurray's.[3] Dr. Orent performed a record review in this matter. He noted that the MRI was over six months old and the findings were consistent with acute tearing of the meniscus, including at the root. He stated that there was absolutely no previous symptoms of his left knee and no history of previous injuries or surgeries. He diagnosed complex meniscal tears and probably exacerbated osteoarthritis of the left knee. He stated that the meniscal tears were acute and the osteoarthritis was asymptomatic until this injury on September 1, 2021. Claimant continued to deteriorate without treatment and showed decreasing ability to function.

23. Dr. Orent opined that Claimant was injured on the job as standing on an angled surface while twisting were not common daily activities. He opined that the twisting motion while having the foot on the angled roof caused a tearing of the meniscus as well as an aggravation of the underlying osteoarthritis. He noted that Claimant had progressively worsened over the course of the last several months with ongoing disuse atrophy, depression and a feeling of worthlessness. He noted that Claimant was clearly not at maximum medical improvement, required reimaging of the left knee, immediate consultation with an orthopedic surgeon and most likely either a meniscectomy or a joint replacement.

24. Claimant was evaluated by Timothy S. O'Brien, M.D., an orthopedic specialist, at Respondents' request for an independent medical evaluation on June 28, 2022. Dr. O'Brien took a history of a popping and pain of the left knee on September 1, 2021 while Claimant was fixing a condenser unit. He noted Claimant had to climb an inclined roof to reach the HVAC unit, and later had popping, pain and swelling of the left knee. He took a history that Claimant was completely asymptomatic prior to this, that he had been going up and down the incline part of the roof and had symptoms of achiness, radiation of pain, tingling, swelling, giving out, clicking, stabbing, numbness and throbbing. On exam, Dr. O'Brien noted that Claimant had atrophy of the thigh (quadricep) of approximately 1.5 cm compared to the right thigh. He found medial joint line tenderness and noted Claimant could not perform a McMurray's because he could not relax. Dr. O'Brien stated that "[I]n order for a meniscus to tear traumatically, even a meniscus with

[3] Test to determine meniscal tears.

preexisting degeneration, the foot had to be planted and there had to be a twisting injury. Despite this, Dr. O'Brien opined that Claimant did not incur an injury and that any work Claimant performed as an HVAC technician was not sufficiently traumatic to cause the left knee problems as they were preexisting and degenerative in nature.

25. This ALJ reviewed the IME Rule 8 recording from Dr. O'Brien's evaluation[4] and it was apparent that Dr. O'Brien failed to delve into the mechanics of how Claimant incurred the injury and what specific movements Claimant performing while working on the inclined roof. Dr. O'Brien's questions to Claimant were frequently multiple questions at once and Claimant would answer one of the questions but not all as the interrogation was a rapid-fire type questioning. A large majority of the questioning related to what other providers told Claimant. The extent of the evaluation took approximately 22 minutes, including the examination, with the first two minutes of Dr. O'Brien speaking extremely quickly about procedures and the need for the recording. Dr. O'Brien was gone from the exam room approximately two to three minutes while Claimant changed, and can be heard speaking in the background indistinctly with someone other than Claimant. He asked how Claimant was injured but interrupted Claimant throughout the explanation, suggesting words. Claimant specifically stated that the popping happened when he was on the incline part of the roof.[5]

26. Dr. Orent testified at hearing that he evaluated Claimant in May 2022 to ascertain whether Claimant's left knee injury was related to any particular event at work. Dr. Orent was accepted as a Board Certified Emergency/Trauma medicine expert as well as an expert in Occupational Medicine and causation analysis. Dr. Orent questioned Claimant extensively about the mechanism of injury while he was in the process of repairing the condenser motor. Claimant provided a history that he was injured as he stepped from the angled roof, while moving equipment and his tool bag in the process of repairing the condenser. Claimant stepped from the angled roof onto the flat roof. There was a twisting motion as he had his foot planted on the angled portion of the roof with his left foot, and taking the step up to the flat portion of the roof with his right foot. Claimant heard a pop of his left knee. After approximately 30 minutes Claimant's left knee had swollen and was hurting.

27. Dr. Orent described that Claimant had a series of torn cartilage in his left knee. One of them was described as a piece of meniscal material folded in the left knee cap. A piece of the meniscus was flipped under and into the intracondylar notch. Dr. Orent persuasively explained that the kind of injury shown on imaging was not from the degenerative process. He stated that the medical literature states that this kind of injury, a bucket handle injury, is generally caused by a traumatic event where the foot is planted on the ground and there is a twisting of the knee. And in this case, the fact that he had his left foot planted on an angled roof with all of his weight while twisting, and a popping of the left knee, is what caused the Claimant's injuries. He explained that this was the only mechanism of injury that caused this kind of flipped piece of the meniscus with a radial (curved) tear.

[4] Claimant's Exhibit 8.
[5] Claimant's Exhibit 8 @ minute 9:30 to 9:38 and minute 21:20 to 21:29.

28. Dr. Orent stated that the definitive event was well beyond the normal activities of daily living, especially standing on an angled roof. Claimant was on a pitched roof of approximately 36° to 38°, which is a very significant angle, and is not something that most individuals do in the course and scope of their lives. He further stated that the timing was not just coincidental because Claimant felt the pop as he had his foot planted on the angled roof with all of his own weight, as well as the part and his tools, when he twisted in order to step up onto the flat portion of the roof. Shortly thereafter Claimant felt the pain and the swelling. Dr. Orent opined, consistent with the medical literature, that Claimant's left knee injury was caused during the course of his employment while working on the roof and was related to the events which occurred on September 1, 2022. He disagreed with Dr. O'Brien's opinion that all of Claimant's left knee condition was degenerative or preexisting.

29. Dr. Orent stated that the MRI findings were also consistent with the kind of injury Claimant described to him. Dr. Orent stated that there was a lack of confounders in this case. That the medical literature states that this kind of injury, where there is a flipped meniscal fragment in the intercondylar notch with a radial tear[6] at the posterior horn root junction, occurs when a patient has the foot planted and twists. And this is exactly how Claimant injured his knee and when he first heard the pop of his knee. He stated that Claimant's condition was not degenerative in nature because the flipped meniscal fragment is generally caused by a planted foot with weight and twisting. He stated that Dr. O'Brien agreed that this was the only mechanism and disagreed with Dr. O'Brien's opinion with regard to causation.

30. Dr. Orent stated that there was no doubt that Claimant had preexisting arthritis in the left knee. However, Claimant was 100% functional prior to the events on September 1, 2022, performing all of his job duties and was asymptomatic. However, Claimant was incapacitated after this date. Dr. Orent stated that Claimant would not have been able to perform his duties, including climbing up onto roofs, flat ones or angled ones, if he had been symptomatic from the degenerative condition. He disagreed with Dr. O'Brien's assessment that Claimant had no particular event that caused the injury.

31. He stated that this was a discrete event that, with no confounders, the timing of the event, the pop when he made a twisting movement while his foot was planted on the angled roof and no other incidents that had occurred. Additionally, he stated that Claimant did not have problems with the knee prior to this event, and the fact that he was completely asymptomatic before this event took place, all indicate that Dr. Orent's causality determination was correct. His opinion, that Claimant was injured in the course and scope of his employment while climbing from the angled roof to the flat roof was what caused the injuries, and was persuasive to this ALJ.

32. Dr. Orent did agree with Dr. O'Brien's opinion that the injury could only occur where there was a planted foot and a twisting of the knee, which is what the literature suggests. Dr. Orent stated he made causation analysis in accordance with the Medical Treatment Guidelines and the teachings of the Level II accreditation. He would make

[6] According to Dr. Orent, a radial tear is a curved tear generally caused by an acute injury where the knee is twisted, as opposed to a straight or lineal tear which is generally caused by degenerative osteoarthritis. (Hearing testimony @ minute 2:02-2:03)

causation determinations throughout his career first as an emergency medicine physician as well as an occupational medicine physician multiple times a day and stated that he considers himself an expert in causation determinations. Dr. Orent stated that O'Brien got the mechanism of injury incorrect because he said that there was no twisting of the knee and Dr. Orent obtained a very clear history that there was a twisting. This ALJ concurs. Dr. Orent opined that there was no other rational explanation of the type of injury other than the planting of the foot and twisting of the knee. He stated that he listened in on the evaluation by Dr. O'Brien and stated Dr. O'Brien was very brief in his questioning of Claimant and did not delve into the specific mechanic of Claimant's movements of the injury.

33. Particularly patent to Dr. Orent was that Dr. O'Brien did not explore the mechanism of injury. He simply asked questions in a rapid-fire type of way. He explained that the IME process can be very intimidating to claimants in general and Claimants do no always correct a physician that make statements that are incorrect.

34. Dr. Orent stated that Claimant had arthritis but that this event of September 1, 2021 caused an aggravation of the condition, that was previously independently non-disabling and asymptomatic. The incident caused a torn meniscus which in itself aggravated the underlying arthritis. And because of the extensive arthritis and the torn meniscus, Claimant probably has no alternatives but to proceed with a left knee replacement surgery. This event specifically precipitated the need for surgery.

35. Dr. Orent stated that the atrophy of the quadriceps could have been caused by the arthritis if it was symptomatic and Claimant had not been using the lower extremities. But here, Claimant had clearly been working, was functioning as an HVAC mechanic, going up ladders and difficult to reach places, and had no symptoms prior to the September 1, 2021 event. Dr. Orent opined that the atrophy here was a direct result from the left knee injury sustained on September 1, 2021.

36. Lastly, Dr. Orent stated that Dr. O'Brien's criticism of Dr. Orent was incorrect as he clearly was not aware of Dr. Orent's medical expertise. Dr. Orent worked as an emergency medicine physician for 14 years and had to treat significant amounts of orthopedic issues while in that practice as well as his workers' compensation practice for over 30 years, which were mostly acute injuries, most commonly orthopedic injuries. A substantial amount of Dr. Orent's training and experience was establishing causality, and separating the work related injuries from the non-work related injuries. Dr. O'Brien, on the other hand, would more than likely treat those patient that had more severe orthopedic conditions that required surgical evaluations and treatment only.

37. Dr. Orent, would defer to the orthopedic provider, regarding Claimant's course of treatment, but believed that the only course was a total knee replacement due to the underlying degenerative condition that was significantly aggravated by the bucket injury caused by the twisting knee that popped, tearing the meniscus in multiple places.

38. Dr. Orent believed Claimant was very straight forward, honest and sincere during his evaluation of Claimant. Dr. Orent physically examined Claimant and addressed that examination in his report. He stated that Claimant had a complex set of moves, and a provider needed to enquire extensively into the mechanics of the moves that Claimant made on the date of the injury to make a proper causality determination consistent with

the requirements of the Division's Accreditation materials and the MTGs. Dr. Orent reviewed the September 9, 2021 notes from the Concentra and the provider did not do a detailed exploration of the mechanism of injury, simply that there was a gradual onset of diffuse pain and swelling, which is not necessarily contradictory. It was just inadequate and not complete because there was no exploration of the mechanism of injury. He further stated that when there is injury and significant loss of range of motion, as was shown on September 9, 2021, there could be no other reasons for the loss of range of motion than joint swelling. He stated that the loss of range of motion, would inhibit McMurray's or other positive tests. The Concentra provider did note that Claimant walked in with a cane and was limping on the date of the exam, which was consistent with an acute injury. Dr. Orent did rely heavily on the Claimant's assertion that he had no significant prior history of left knee pain and nothing in the medical records changed his mind to that effect. He saw no way with that kind of AROM that Claimant could have been climbing ladders up and down, fairly frequently, with equipment, to perform his job.

39. Dr. O'Brien also testified at hearing in this matter in regard to his evaluation of Claimant, as documented in the above described report. Dr. O'Brien was accepted as an expert that was Board Certified in Orthopedics and as a Level II accredited physician. He is currently retired but, when he was practicing for approximately 30 years, 20 to 30% of his practice involved work injured patients and he had to make assessments for causation in those cases. Dr. O'Brien disagreed with Dr. Orent's opinions and causation analysis, stating that whatever was recorded in the most contemporaneous report is generally the most accurate. He also stated that there was 0% chance that Claimant had an acute injury or that there was 0% chance that Claimant did not have ongoing pain in the left knee based on his experience. Further, he testified that there was virtually no probability that Claimant would not have significant pain going up and down ladders in performing his job, considering the extent of the osteoarthritis in his knee. He continued to opine that Claimant's condition was purely related to the degenerative process. Dr. O'Brien was found to not be persuasive.

40. As found, Claimant was credible in that he had no pain prior to his September 1, 2021 work related injury. He performed the job of a HVAC service technician for almost two years without incident or limitation. He would typically have to climb ladders to the roof and then climb the roof, some of which were extremely steep. In this case he was on an inclined roof surface, while carrying mechanical parts as well as his tools. He was in the process of stepping from the steep inclined roof onto the flat portion of the roof, with all of his weight on his left lower extremity, and lifting his right leg to make the step, when his knee was twisted and he felt a pop. Claimant unquestionably had osteoarthritis. However, it was asymptomatic. He may have also had some level of meniscus degeneration that caused tears in his meniscus. However, the action of twisting the knee in this case, caused an aggravation of the preexisting osteoarthritis as well as caused the flipped meniscal fragment in the intercondylar notch with a radial tear and aggravation of other meniscus degeneration.

41. As found, Dr. Orent specifically inquired about the exact motion Claimant was making when he had the pop of the knee. As found, Dr. Richardson failed to ask Claimant what the mechanics of the movements he was making. However, both Dr. Orent and Dr. Richardson reached the same conclusion, that Claimant experienced a work

related injury on September 1, 2021, which included meniscal tears and an aggravation of the underlying arthritis of the left knee. While it is patent that Claimant had a significant amount of arthritis, as credibly described by Dr. Orent, that condition was asymptomatic and did not impede Claimant from working full duty without limitations. Dr. Orent's testimony in this regard is credible and persuasive over the contrary opinions of Dr. O'Brien. Claimant has shown that he was injured in the course and scope of his employment with Employer, causing a flipped meniscal fragment into the intercondylar notch with a radial tear at the posterior horn root junction of the meniscus. Claimant has further shown that the meniscal radial tear and other menisci injuries caused the asymptomatic arthritis to become symptomatic, thereafter causing a disability and aggravation of the underlying condition. Lastly, Claimant has shown that he requires medical care to relieve him of his work related injury, including possible total knee replacement due to the underlying degenerative condition that was significantly aggravated by the bucket injury caused by the twisting knee tearing the meniscus.

42. Claimant has credibly shown that he was under medical restrictions of sedentary work as of September 9, 2021, but did not return to work as of September 2, 2021 when he had his drug test performed. Claimant is entitled to temporary disability benefit. Claimant stated that he returned to work for three to four weeks but neither party provided the wage records for time periods just prior to the work injury or subsequent to the September 1, 2021 injury date to determine which weeks those were. This ALJ infers from the January 10, 2022 letter, from the third party administrator, that the modified duty was no longer available beginning November 8, 2021. Due to the lack of records or testimony regarding average weekly wage that was proximal to the September 1, 2021 work related injury, this ALJ is unable to determine Claimant's average weekly wage.

43. As found, Respondents have failed to show Claimant was terminated for cause due to his failure to respond to the request for leave of absence documentation. Claimant credibly testified that he received the letters from the third party administrator but when he discussed it with his supervisor, he was instructed to ignore them as Claimant was injured at work and the letters did not apply to him. He was further advised that the human resource office would take care of it. Claimant also credibly stated that he never applied for the leave of absence indicated in the letters, that it likely was done by the HR office on his behalf as indicated in the letters. Respondents have failed to show by a preponderance of the evidence that Claimant was terminated for cause.

44. Any evidence or possible inferences contrary to the above findings, including any evidence that the accident occurred on September 2, 2021, were specifically found not persuasive.

CONCLUSIONS OF LAW

A. Generally

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

of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. The Act is remedial and beneficent in purpose and should be liberally construed to accomplish its humanitarian purpose of assisting injured workers and their families. *Colo. Counties, Inc. v. Davis*, 801 P.2d 10, 11 (Colo App.1990); *County Workers Comp. Pool v. Davis,* 817 P.2d 521 (Colo.1991); Williams v. Kunau, 147 P.3d 33 (Colo. 2006). A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

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

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

B. Compensability

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

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

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

Pain is a typical symptom from an aggravation of a pre-existing condition, and if the pain triggers the claimant's need for medical treatment, the claimant has suffered a compensable injury. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Dietrich v. Estes Express Lines*, W.C. No. 4-921-616-03 (September 9, 2016). But the mere fact that a claimant experiences symptoms at work does not necessarily mean the employment aggravated or accelerated the pre-existing condition. *Finn v. Industrial Commission*, 437 P.2d 542 (Colo. 1968); *Cotts v. Exempla*, W.C. No. 4-606-563 (August

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

As found, based on the totality of the evidence, the medical records, Claimant's testimony, and the opinions of Dr. Orent are more persuasive than the contrary opinions of Dr. O'Brien. Claimant credibly stated that he had no pain of the left knee prior to his September 1, 2021 work related injury. He performed the job of a HVAC service technician without incident or limitation from his left knee. He would typically have to climb ladders to the roof and then climb the roof, some of which were extremely steep as was the incline of the roof he had to climb on September 1, 2021. In this case he was on an inclined roof surface, while carrying mechanical parts as well as his heavy tools. He was in the process of stepping from the steep inclined roof onto the flat portion of the roof, with all of his weight on his planted left lower extremity, and lifting his right leg to make the step, when he twisted his left knee, and he felt a pop. Claimant has osteoarthritis. However, it was asymptomatic until this twisting and popping event. He may have also had some level of meniscus degeneration that caused tears in his meniscus. However, the action of twisting the knee in this case, caused an aggravation of the preexisting osteoarthritis as well as caused the flipped meniscal fragment in the intercondylar notch with a radial tear at the posterior horn root junction and other aggravations of meniscal tears. This aggravation was also demonstrated and supported by the fact that Dr. Richardson never documented that Claimant had any muscle atrophy, but by the time both Dr. Orent and Dr. O'Brien evaluated Claimant, Claimant had significant quadricep atrophy. Claimant has shown that it was more likely than not that he incurred an injury and aggravation of preexisting conditions proximally caused by the accident of September 1, 2021.

As further found, Dr. Orent specifically inquired about the exact motion Claimant was making when he had the pop of the knee. As found, Dr. Richardson failed to ask Claimant what the mechanics of the movements he was making. However, both Dr. Orent and Dr. Richardson reached the same conclusion, that Claimant experienced a work related injury on September 1, 2021. While it is patent that Claimant had a significant amount of arthritis, as credibly described by Dr. Orent, that condition was asymptomatic and did not impede Claimant from working full duty without limitations. Dr. Orent's testimony was credible and persuasive over the contrary opinions of Dr. O'Brien. Claimant has shown that he was injured in the course and scope of his employment with Employer, causing radial meniscal tear and aggravation of other meniscal tears. Claimant has further shown that the related meniscal tears caused the asymptomatic arthritis to become symptomatic, causing a work related disability. Claimant has shown that it was more likely than not that he incurred a twisting injury and aggravation of preexisting condition to his left knee within the course and scope of his employment with Employer, which are related to the accident of September 1, 2021.

C. Reasonably Necessary Medical Benefits

Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work-related injury. Section 8-42-101,

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

Claimant has proven by a preponderance of the evidence that he is entitled to all reasonable and necessary medical care related to the aggravation of the preexisting condition as well as the meniscal injuries. Dr. Orent credibly testified that Claimant requires medical care in this case due to the September 1, 2021 work related injury, including, possibly, a total left knee replacement/arthroplasty in light of the aggravation of the underlying osteoarthritis. Claimant has shown that it is more likely than not that he requires medical care to relieve him of his work related injuries, including possible total knee replacement due to the underlying degenerative condition that was significantly aggravated by the bucket type injury caused by the twisting knee tearing the meniscus.

D. Temporary Disability Benefits

Entitlement to temporary disability benefits is conditioned on whether Claimant is entitled to benefits or has been terminated for cause so these issues are interlinked.

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

occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S. Claimant alleges temporary total disability benefits from September 2, 2021 through the present.

As found, Claimant has proven by a preponderance of the evidence that he is entitled to receive TPD or TTD benefits for the period beginning September 2, 2021 until terminated by law. The evidence shows that Claimant was unable to return to his regular employment as a service technician due to the requirement to go up on roofs and the like. Claimant testified he was not provided with modified work other than for approximately three to four weeks. Claimant's testimony in this regard is found credible. Here, there is no doubt or question that Claimant was under work restrictions as provided by his authorized treating physician. The last restrictions as provided by Dr. Richardson on October 7, 2021 of occasionally lifting and carrying up to 20 lbs.; frequently lifting up to 10 lbs.; no use of ladders, no kneeling, no squatting, sitting 50% of the time, may be on his feet up to 15 minutes at a time and use cane as needed. Neither party submitted any ATP records subsequent to this date.[7] Based on the evidence presented, Claimant has shown by a preponderance of the evidence he is entitled to temporary total or temporary partial disability benefits.

However, neither party submitted the wage records to appropriately calculate the lost earnings.

E. Termination for Cause

A disabled claimant is entitled to temporary total disability (TTD) benefits if they miss more than three days of work. Sec. 8-43-105, C.R.S.; *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage-earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). Impairment of earning capacity may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

The termination statutes, Sections 8-42-105(4) and 8-42-103(1)(g), C.R.S. both provide that in cases "where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." The burden shifts to the employer, who bears the burden of establishing by a preponderance of the evidence that a claimant was terminated for cause or was responsible for the separation from employment. *Gilmore v. Industrial Claim Appeals Office,* 187 P.3d 1129, 1132 (Colo. App. 2008).

[7] This ALJ infers that Respondents no longer authorized any further visits with the ATP from this date forward other than the MRI, and that Claimant has not been placed at MMI by any ATP.

In *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P3d 1061 (Colo. App. 2002), the court held that the term "responsible" reintroduced into the Workers' Compensation Act the concept of "fault" applicable prior to the decision in *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). "Fault" requires that the claimant must have performed some volitional act or exercised a degree of control over the circumstances resulting in the termination. *See Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1995) *opinion after remand* 908 P.2d 1185 (Colo. App. 1995). A claimant does not act "volitionally" or exercise control over the circumstances leading to his termination if the effects of the injury prevent him from performing assigned duties and cause the termination. *In re of Eskridge,* W.C. No. 4-651-260 (ICAO, Apr. 21, 2006). Therefore, to establish that Claimant was responsible for the termination, Respondents must demonstrate by a preponderance of the evidence that Claimant committed a volitional act, or exercised some control over the termination under the totality of the circumstances. *See Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus "responsible" if he precipitated the employment termination by a volitional act that he would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety,* W.C. No. 4-432-301 (ICAP, Sept. 27, 2001). Ultimately, the question of whether the claimant was responsible for the termination is one of fact for determination by the ALJ. *Apex Transportation, Inc. v. Industrial Claim Appeals Office*, 321 P.3d 630, 632 (Colo. App. 2014).

While Claimant was purportedly terminated for failing to provide some documentation, Claimant relied upon his supervisor's instructions that the letters from the third party administrator did not pertain to him, as he was injured on the job. Claimant credibly testified that he spoke to his supervisor with regard to the forms and was specifically instructed not to complete them. Claimant relied on those instructions. As found by the totality of the evidence, Claimant did not commit a volitional act that led to his termination. Respondents have failed to show by a preponderance of the evidence that Claimant committed a volitional act that led to the circumstance of his termination. He was just following the instructions of his supervisor.

F. Average Weekly Wage

An ALJ may choose from two different methods set forth in Section 8-42-102, C.R.S. to determine a claimant's average weekly wage (AWW). The first method, referred to as the " default provision," provides that an injured employee's AWW "be calculated upon the monthly, weekly, daily, hourly, or other remuneration which the injured or deceased employee was receiving at the time of injury." Sec. 8-42-102(2), C.R.S. The default provision in Section 8-42-102(2), C.R.S. provides compensation is payable based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But Sec. 8-42-102(3) gives the ALJ wide discretion to "fairly" calculate the employee's AWW in any manner that is most appropriate under the circumstances. The entire objective of AWW calculation is to arrive at a "fair approximation" of the claimant's actual wage loss and diminished earning capacity because of the industrial injury. *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993); *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993); *Ebersbach v. United Food & Commercial Workers Local No. 7,* W.C. No. 4-240-475 (ICAO May 7, 1997); *Vigil v. Industrial Claim Appeals Office*, 841

P.2d 335 (Colo.App.1992). Here, the parties failed to provide records concurrent to the date of the compensable injury of September 1, 2021. The last records in evidence show wages only through April 10, 2021. This ALJ is unable to calculate the average weekly wage in this matter.

ORDER

IT IS THEREFORE ORDERED:

1. Pursuant to the stipulation of the parties, regarding the hernia injury which is the subject of the W.C. No. 5-153-595 claim, the parties' stipulation is approved and entered as an order. If a Final Admission has not been filed since the date of the August 17, 2022 hearing, Respondents shall file an admission consistent with Dr. Anjmun Sharma's DIME report within ten (10) days of this order.

2. Claimant sustained a work related injury on September 1, 2021, the subject of W.C. No. 5-184-07, in the course and scope of his employment with Employer and this claim is compensable.

3. Respondents shall pay for all medical benefits in this matter that are reasonably necessary and related to the aggravation of the preexisting osteoarthritis and the meniscal injuries caused by the September 1, 2021 work related accident. Any medical costs associated with the claim are subject to the Colorado Workers' Compensation Medical Fee Schedule.

4. Respondents shall pay temporary disability benefits from September 2, 2021 until terminated by law. The parties shall exchange any wage records from any of Claimant's earnings from April 2021 to the present within 10 days of this order, in order to calculate average weekly wage and the lost wages. Should the parties be unable to reach a determination of average weekly wage or benefits from September 2, 2021 to the present the parties shall provide the wage information to this ALJ within thirty (30) days of this order and a supplemental order shall be issued.

5. Respondents' claim of termination for cause is denied and dismissed.

6. Respondents shall pay interests at the statutory rate of 8% per annum on all amounts not paid when due.

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

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

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

DATED this 22nd day of September, 2022.

Digital Signature

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

ISSUES

- Whether Claimant proved by a preponderance of the evidence she is entitled to Temporary Total Disability (TTD) benefits from September 20, 2021 through September 22, 2021, October 2, 2021, and October 14, 2021 through April 20, 2022.

- Whether Claimant proved by a preponderance of the evidence Respondent is subject to penalties under §8-43-304(1), C.R.S. for a violation of W.C.R.P. 5-2(C).[1]

STIPULATIONS

At hearing the parties stipulated to an AWW of $685.58 with a corresponding TTD rate of $457.08.

FINDINGS OF FACT

1. Claimant has worked for Employer for approximately four years as a head baker.

2. Claimant's scheduled shift was from 12:30 a.m. to 8:30 a.m.; however, with agreement from management, she would often report to work between 6:30 p.m. or 7:30 p.m. and work six to eight hours to complete her shift.

3. Claimant was scheduled to begin a shift at 12:30 a.m. on Sunday, September 19, 2021. Claimant clocked in for this shift at 6:28 p.m. on Saturday, September 18, 2021.

4. Claimant sustained an admitted industrial injury at approximately 11:45 a.m. on September 18, 2021. Claimant felt pain in her left shoulder and neck area while transferring sheet pans. Claimant completed her shift and clocked out at 2:10 a.m. Upon finishing her shift, Claimant went home and iced her shoulder, took ibuprofen, and went to sleep. Claimant testified that her shoulder did not feel any better when she woke up on Sunday, September 19, 2021.

5. Claimant's next shift was scheduled to begin at 12:30 a.m. on Monday, September 20, 2021. Timecards show that, per her usual procedure, Claimant clocked in for her Monday, September 20, 2021 shift at 6:35 p.m. on Sunday, September 19, 2021. Upon arriving at work, Claimant reported her injury to HR[Redacted], Human Resources Assistant Store Manager. Claimant's timecards show that she worked 7.18 hours for her shift on Monday, September 20, 2021, leaving work at 2:16 a.m. on Tuesday, September 20, 2021.

[1] Based on evidence presented at hearing, Claimant withdrew her penalty claim under §8-43-304(1), C.R.S. for Respondent's failure to admit or deny liability under §8-43-203(2)(a), C.R.S.

6. On September 20, 2021, Claimant presented to authorized treating provider Monica Fanning Schubert, NP at the office of Bryan Alvarez, M.D. NP Schubert diagnosed Claimant with a left shoulder strain and placed Claimant on the following temporary restrictions from September 22, 2021 to October 7, 2021: lifting, repetitive lifting, and carrying limited to 5 lbs. and no overhearing reaching. NP Schubert removed Claimant from all work from September 20, 2021 to September 21, 2021.

7. Claimant testified at hearing that she was unable to perform her regular job duties with these restrictions.

8. Claimant's next shift was scheduled to begin at 12:30 a.m. on Tuesday, September 21, 2021. Claimant did not work her scheduled shift on September 21, 2021 due to being removed from work by NP Schubert for that date. Claimant also did not work her scheduled shift on Wednesday, September 22, 2021 due to her work injury.

9. Claimant began light duty work for her next scheduled shift on September 25, 2021. Claimant testified that she was unsure if she missed any time from work as a result of her shoulder injury from September 22, 2021 until she stopped working on the evening of October 12, 2021, for her shift on October 13, 2021. Claimant had no specific memory of whether she did or did not miss work on October 2, 2021. The bakery schedule shows that Claimant was scheduled to work on October 2, 2021. Claimant's timecards do not show any hours worked on October 2, 2021.[2]

10. Respondent filed a First Report of Injury with the DOWC on September 28, 2021.

11. On October 7, 2021, Dr. Alvarez imposed restrictions from October 7, 2021 to October 28, 2021 of lifting/carrying/pushing/pulling of 5 lbs. and no reaching overhead with the left upper extremity. Timecards show that Claimant was off work on October 8, but worked her shifts with those restrictions on October 9-12, 2021.

12. Upon completing her scheduled shift on October 13, 2021, Claimant testified that she informed Ms. HR[Redacted] and CG[Redacted], Store Manager, that she could not continue performing the modified duty work in the bakery. Claimant testified that she had begun experiencing problems with her right shoulder due to overcompensating for her injured left shoulder, and that her left upper extremity continued to be in pain. At that time, Ms. HR[Redacted] and Ms. CG[Redacted], discussed with Claimant finding lighter duty work options in other parts of the store. They informed Claimant that she could work sitting at a table at the front of the store asking customers if they were interested in completing an application for employment. Claimant testified she declined the verbal offer at that time due to concerns about increased exposure to COVID-19.

13. Claimant returned to Dr. Alvarez on October 28, 2021. At that time Dr. Alvarez gave Claimant a written release to work with restrictions from October 28, 2021 to November 18, 2021 on both the left and right upper extremities of no

[2] Based on the evidence presented at hearing Claimant is not requesting TTD for October 2, 2021.

lifting/carrying/pushing/pulling more than 5 lbs. and no reaching overhead.

14. Claimant testified that she could not perform her regular or modified work duties with those restrictions.

15. Dr. Alvarez continued the same bilateral restrictions on November 18, 2021, December 9, 2021, January 20, 2022, and February 10, 2022. On March 3, 2022, Dr. Alvarez increased the bilateral restrictions to 15 lbs. lifting/carrying/pushing/pulling and 1 lb. overhead reaching.

16. Respondent filed a General Admission of Liability on December 7, 2021.

17. Claimant underwent left shoulder surgery on April 21, 2022 and has received TTD benefits since such time.

18. On or around November 9, 2021, Claimant received a written offer of modified duty from Employer (dated October 29, 2021). The letter noted Claimant's restrictions of no lifting, carrying, pushing, or pulling over 5 lbs. and no overheard reaching. The offer was for the same position discussed with Claimant on October 13, 2021 - sitting at a table at the front of the store asking customers if they were interested in completing an application for employment.

19. Claimant declined the written offer of modified duty on November 16, 2021. Under "Reason" Claimant wrote: "Increased exposure to COVID-19; while numbers of infect are high in community, And [Employer] does not require customers or employees to wear masks in store." Claimant authored a separate letter on November 16, 2021 stating, in relevant part,

> I'm declining the light-duty (other than bakery) that you are now offering because I do not want to be placed in front of store where every customer and employee will be entering and exiting the store, putting myself at a higher risk of contracting COVID-19. As of right now cases of COVID-19 in our neighborhood area are at highest numbers since last December. [Employer] does not require customers or employees to wear a mask in store even though signage is posted.

(Cl. Ex. 5, p. 37).

Claimant further stated that she was requesting FMLA leave until January 1, 2022 so that she could heal and return to her position in the bakery.

20. Claimant testified that she received the written offer of modified duty five days prior to November 16, 2021. Claimant testified that she declined the written offer of modified duty because of increased exposure to COVID. Claimant testified that she lives with other family members including, at the time, a five-month old granddaughter and her father-in-law. Claimant testified that two other family members also worked outside of the

house. Claimant testified that, at the time, COVID numbers were high and she practiced masking at work but, despite a mask mandate, Employer did not enforce the mandate. Claimant further testified that she was hired to work in the bakery and was not hired by Employer to take applications. Claimant further testified that she was in constant pain and did not want to work outside of the bakery, moving from night shift to day shift. Claimant did not state she was physically unable to perform the modified duty or that there were any other circumstances precluding her from doing so.

21. Ms. HR[Redacted] testified at hearing on behalf of Respondent. Ms. HR[Redacted] testified that the modified duty position offered to Claimant involved sitting at a table at the front of the store taking employment applications for approximately eight hours a day during a day shift. Ms. HR[Redacted] testified that the modified position was within Claimant's work restrictions.

22. PA[Redacted] testified at hearing on behalf of Respondent. Ms. PA[Redacted] was the adjuster on Claimant's claim beginning September 2021. Ms. PA[Redacted] has approximately seven years of experience adjusting workers' compensation claims in Colorado. Ms. PA[Redacted] is aware that the Act and the Rules require a position statement to be filed with 20 days of a First Report of Injury.

23. On October 1, 2021, Ms. PA[Redacted] completed a Notice of Contest listing the DOWC as a recipient, and certified the filing and mailing of the document to the DOWC. At hearing, Ms. PA[Redacted] admitted that she did not file the Notice of Contest with DOWC. She testified that, on October 1, 2021, she input the workers' compensation number from the DOWC into Insurer's computer system and mailed the Notice of Contest to Claimant only without filing a copy of the document with the DOWC. She testified that she mistakenly failed to complete the form that gets filed with the DOWC because October 1, 2021 was one of her last days with Insurer before her employment ended. She testified that she was trying to get everything done with a caseload of over 100 cases, was in a hurry, and mistakenly forgot to file Insurer's position with the DOWC.

24. Claimant testified that she spoke to Ms. PA[Redacted], who told Claimant that the claim was under investigation and that Respondent could not provide additional medical treatment until the investigation was completed and Respondent received Dr. Burris's IME report. In addition, Claimant confirmed that she received the Notice of Contest mailed by Ms. PA[Redacted] on October 1, 2021. Claimant testified that Respondent's failure to timely file with the DOWC caused her stress and financial struggles.

25. Ms. PA[Redacted] acknowledged that Claimant was on work restrictions as of October 14, 2021, and those and restrictions increased as of October 28, 2021. Ms. PA[Redacted] admitted that she knew of the fact that Claimant was off work from October 14 and continuing. She further acknowledged that Claimant had not received the light duty job offer until at least October 29, 2021 (at the earliest).

26. Claimant remains employed by Employer but has not returned to work for Employer since October 14, 2021.

27. Claimant failed to prove it is more likely than not she is entitled to TTD benefits for September 20, 2021, as she did not sustain any lost time on that day.

28. Claimant proved it is more probable than not she is entitled to TTD benefits September 21-22, 2021 and October 14, 2021 to November 16, 2021.

29. Respondent proved it is more probable than not that Claimant refused a reasonable offer of modified employment, thus terminating her TTD benefits from November 17, 2021 to April 20, 2022.

30. Claimant proved by a preponderance of the evidence Respondent violated W.C.R.P. 5-2(C). Respondent failed to prove its conduct was objectively reasonable and is thus subject to penalties.

CONCLUSIONS OF LAW

Generally

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

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

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

TTD Benefits

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

TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

<u>September 20-22, 2021</u>

As found, Claimant is not entitled to TTD benefits for September 20, 2021 as Claimant did not miss any time from work on that date. Claimant did miss work and sustain wage loss on September 21 and 22, 2021 as a result of her work injury. As of the date of hearing, Claimant has missed more than 14 days of work as a result of her work injury. The preponderant evidence establishes, and Respondent does not dispute, that Claimant is entitled to TTD benefits for September 21 and 22, 2021.

<u>October 14, 2021 through April 20, 2022</u>

Respondent argues that Claimant's wage loss from October 14, 2021 through April 20, 2022 was not caused by her industrial injury, but instead by Claimant declining an offer of modified duty.

The applicable law to establish entitlement to temporary disability benefits should not be conflated with the applicable law for termination of temporary disability benefits due to a refusal to begin an offer of modified employment. *In re Claim of Tapp*, W.C. No. 5-120-394-001 (ICAO, Mar. 8, 2021); *Archuletta v. Industrial Claim Appeals Office*, 381 P.3d 374, 378 (Colo. App. 2016).

It is undisputed Claimant continued working in the bakery in a modified capacity until October 14, 2021 and was not receiving any temporary indemnity benefits. Claimant's refusal of an offer modified employment cannot be a basis for finding Claimant is not *entitled* to temporary indemnity benefits in the first instance. Accordingly, here, the ALJ must first address Claimant's initial entitlement to temporary indemnity benefits.

Claimant proved it is more probable than not she is entitled to TTD benefits from October 14, 2021 through November 16, 2021. Claimant left work and sustained actual wage loss during this time period due to a disability caused by the work injury. Claimant credibly testified that she was physically unable to continue performing the modified duty work available to her in the bakery due to pain in her left and right upper extremities. Soon thereafter Dr. Alvarez placed Claimant on restrictions for her bilateral upper extremities. As a result of the work injury, Claimant suffered medical incapacity and was unable to resume her prior work.

As Claimant proved her initial entitlement to TTD benefits and has been awarded TTD benefits pursuant to this order, the ALJ's second determination is whether Claimant's TTD benefits should be terminated due to a refusal of a modified job offer.

Section 8-42-105(3)(d)(I), C.R.S., authorizes the termination of TTD benefits when "the attending physician" gives the claimant a "written release to return to modified employment, such employment is offered in writing, and the employee fails to begin such employment." Where the employers seek to terminate benefits under this statute, they bear the burden of establishing the factual predicate for its application. *Gilmore v. Indus. Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008); *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office,* 18 P.3d 790 (Colo. App. 2000). It is a question of fact for the ALJ to decide whether a claimant has been released to return to work. *Archuletta v. Industrial Claim Appeals Office*, *supra*.

The term "modified employment" means employment within the restrictions established by the attending physician. *See Flores-Arteaga v. Apple Hills Orchard Juice Co.*, W.C. No. 3-101-024 (ICAO, Feb. 15, 1996). The offered modified employment must be reasonably available to the claimant under an objective standard. *Willhoit v. Maggie's Farm*, WC 5-054-125-01 at *4 (ICAO, July 26, 2018); *Ragan v. Temp Force*, W.C. No. 4-216-578 (ICAO, June 7, 1996). A claimant's rejection of offered modified employment does not constitute responsibility for termination. The ALJ should consider the consequences of the industrial injury, the financial hardship that would be imposed on the

claimant by accepting the modified employment and "[a]ny other reasons that would, in the opinion of the administrative law judge, make it impracticable for the claimant to accept the offer of modified employment." §8-42-105(4)(b)(II), C.R.S.

Claimant's attending physician, Dr. Alvarez, gave Claimant a written release to return to modified employment. Respondent made a written offer of modified duty to Claimant on or around November 9, 2021 which was compliant with the restrictions assigned by Dr. Alvarez on October 28, 2021. Claimant declined the offer of modified employment and did not begin such employment. Claimant does not allege, nor is there any evidence, that the modified duty position offered to Claimant did not comply with her restrictions. There is no evidence, nor does Claimant contend, that she declined the offer of modified duty due to a physical inability to perform the work. Claimant instead declined the offer of modified employment because she did not want to increase her exposure to COVID and because she wanted to continue working in the bakery on the night shift. While the offer of modified employment was not ideal for Claimant, the preponderant evidence establishes that the offer was objectively reasonable and reasonably available to Claimant.

The modified employment did not require Claimant to violate any of her medical restrictions. While not enforced by Employer, there was signage requiring customers and employees to wear masks in the store. Claimant testified that she took precautions of wearing her mask. Outside of a general concern of COVID exposure, Claimant offered no evidence indicating she has a particular medical condition or that she was otherwise immunocompromised such that contracting COVID would place her at a higher risk. Although Claimant noted concerns of potentially exposing other individuals in her household to COVID, Claimant acknowledged that two other members of her household also worked outside of the home and thus would have some exposure to COVID as well.

The record establishes that Claimant also declined the work offer because she did not want to work outside of the bakery department and did not want to work a day shift. Claimant testified that she was hired to work in the bakery department and was not hired to take applications. Employer was not required to offer Claimant modified work in the bakery department nor on the night shift. Importantly, there is no evidence Claimant was unable to work on the day shift or that there were particular circumstances precluding Claimant from doing so. *See, e.g., Simington v. Assured Transportation and Delivery*, W.C. No. 4-318-208 (March 19, 1998) (the claimant's refusal of an offer of modified duty was reasonable where the claimant had moved further from the employer's place of business due to a fire at the claimant's home, the effects of medication taken for the industrial injury prevented the claimant from driving to work, and the claimant lived in a remote area where other forms of transportation were not available).

Based on the totality of the circumstances, the offer of modified employment was objectively reasonable and reasonably available to Claimant. Notwithstanding Claimant's subjective concerns, the offer was one which Claimant could accept as a practical matter. As such, her refusal of the offer of modified employment provides a basis for termination of TTD from November 17, 2021 to April 20, 2022.

Penalties

Section 8-43-304(1), C.R.S. provides that a daily monetary penalty may be imposed on any employer who violates articles 40 to 47 of title 8 if "no penalty has been specifically provided" for the violation. Section 8-43-304(1), C.R.S. is thus a residual penalty clause that subjects a party to penalties when it violates a specific statutory duty and the General Assembly has not otherwise specified a penalty for the violation. *See Associated Business Products v. Industrial Claim Appeals Office*, 126 P.3d 323 (Colo. App. 2005).

Whether statutory penalties may be imposed under §8-43-304(1) C.R.S. involves a two-step analysis. The ALJ must first determine whether the insurer's conduct constitutes a violation of the Act, a rule or an order. Second, the ALJ must determine whether any action or inaction constituting the violation was objectively unreasonable. The reasonableness of the insurer's action depends on whether it was based on a rational argument in law or fact. *Jiminez v. Industrial Claim Appeals Office,* 107 P.3d 965 (Colo. App. 2003); *Gustafson v. Ampex Corp.,* WC 4-187-261 (ICAO, Aug. 2, 2006). There is no requirement that the insurer know that its actions were unreasonable. *Pueblo School District No. 70 v. Toth,* 924 P.2d 1094 (Colo. App. 1996).

The question of whether the insurer's conduct was objectively unreasonable presents a question of fact for the ALJ. *Pioneers Hospital v. Industrial Claim Appeals Office,* 114 P.3d 97 (Colo. App. 2005); *see Pant Connection Plus v. Industrial Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010). A party establishes a prima facie showing of unreasonable conduct by proving that an insurer violated a rule of procedure. *See Pioneers Hospital* 114 P.2d at 99. If the claimant makes a prima facie showing the burden of persuasion shifts to the respondents to prove their conduct was reasonable under the circumstances. *Id.*

An ALJ may consider a "wide variety of factors" in determining an appropriate penalty. *Adakai v. St. Mary Corwin Hospital,* WC 4-619-954 (ICAO, May 5, 2006). However, any penalty assessed should not be excessive in the sense that it is grossly disproportionate to the conduct in question. *Associated Business Products v. Industrial Claim Appeals* Office, 126 P.3d 323 (Colo. App. 2005); *Espinoza v. Baker Concrete Construction*, WC 5-066-313 (ICAO, Jan. 31, 2020). When determining the penalty the ALJ may consider factors including the "degree of reprehensibility" of the violator's conduct, the disparity between the actual or potential harm suffered by the claimant and the award of penalties, and the difference between the penalties awarded and penalties assessed in comparable cases. *Associated Business Products*, 126 P.3d at 324. When an ALJ assesses a penalty, the Excessive Fines Clause of the Eighth Amendment to the U.S. Constitution requires the ALJ to consider whether the gravity of the offense is proportional to the severity of the penalty, whether the fine is harsher than fines for comparable offenses in this or other jurisdictions and the ability of the offender to pay the fines. The proportionality analysis applies to the fine for each offense rather than the total of fines for all offenses. *Conger v. Johnson Controls Inc*., WC 4-981-806 (ICAO, July 1, 2019).

Claimant seeks penalties for Respondent's violation of W.C.R.P. 5-2(C). W.C.R.P. 5-2(C) provides that the insurer shall state whether liability is admitted or contested within 20 days after the date the employer's First Report of Injury is filed with the Division.

Respondent argues that W.C.R.P. 5-2(C) requires that the insurer only "state" whether liability is admitted or contested, not "file" a document with the DOWC. Respondent, therefore, contends that the Notice of Contest mailed to Claimant on October 1, 2021 complies with the requirement of W.C.R.P. 5-2(C). The ALJ disagrees.

Respondent does not cite any authority supporting its argument and its argument does not comport with the established methods by which an insurer states its position pursuant to W.C.R.P. 5-2(C). An insurer states a position either contesting or admitting liability by filing with the DOWC a Notice of Contest or General Admission of Liability. Respondent effectively argues that an insurer could simply state, by any method, its position without notifying the DOWC, which could not be the intention of the rule. Moreover, Ms. PA[Redacted], an experienced adjuster, testified to her understanding that the Act and the W.C.R.P. require a position statement to be filed with the DOWC within 20 days of a First Report of Injury. Additionally, the certificate of service on the Notice of Contest, prepared and signed by Ms. PA[Redacted], demonstrates that the Notice of Contest was required to be filed with the DOWC and that Ms. PA[Redacted] intended to do so.

Respondent's failure to file the Notice of Contest with the DOWC within 20 days of filing the First Report of Injury constitutes a violation of W.C.R.P. 5-2(C). As Claimant proved Insurer violated a rule of procedure, she has made a prima facie showing of unreasonable conduct. Accordingly, it is Respondent's burden to prove its conduct was reasonable.

Respondent failed to prove its conduct was objectively reasonable. Ms. PA[Redacted] was aware of the requirement under W.C.R.P. 5-2(C) and failed to comply. Ms. PA[Redacted] admitted that she mistakenly failed to file Insurer's position with the DOWC because she was in a hurry and was busy attempting to complete all of her work before transferring jobs.Insurer's conduct was within its control and was objectively unreasonable. As such, penalties are appropriate.

Respondent offered no evidence of its ability to pay any imposed penalties. There is no evidence indicating Respondent is unable to pay a penalty that is proportionate to its offense. Based on the degree of reprehensibility of Respondent's conduct, the harm suffered by Claimant, and penalties assessed in comparable cases, the ALJ concludes that a penalty of $50.00/day is appropriate. Respondent was in violation of W.C.R.P. 5-2(C) from October 12, 2021 until it filed the General Admission of Liability on December 7, 2021 (a period of 56 days). Accordingly, a total penalty of $2,800 shall be imposed.

ORDER

1. Claimant proved by a preponderance of the evidence he is entitled to TTD benefits September 21-22, 2021 and October 14, 2021 to November 16, 2021. Respondent shall pay Claimant TTD benefits at the stipulated TTD rate.

2. Respondent proved by a preponderance of the evidence Claimant refused a reasonable offer of modified employment, terminating Claimant's TTD benefits from November 17, 2021 to April 20, 2022.

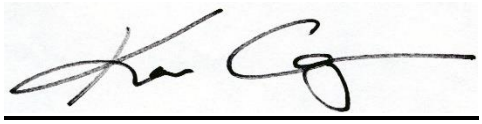
3. Respondent shall pay $2,800.00 in penalties its failure to timely state whether liability is admitted or contested pursuant to W.C.R.P. 5-2(C). 75% ($2,100.00) shall be paid to Claimant and 25% ($700.00) shall be paid to the Subsequent Injury Fund created in §8-46-101, C.R.S.

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

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

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

DATED: September 22, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

The issues addressed in this order concerns the calculation of Claimant's average weekly wage (AWW). The specific question answered is:

I. Whether Claimant established, by a preponderance of the evidence, that he is entitled to an increase in his AWW from $460.62/week to $640.00/week.

FINDINGS OF FACT

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

1. Employer operates as a staffing agency that matches workers with employers to fill job openings in the construction trades. Claimant was hired by Employer to work as a construction laborer for [Third party name redacted] in the area of erosion control.

2. Claimant testified that before being hired by [Employer Redacted], he had quit a job in erosion control with another company because he was not getting full time hours. He testified that after he quit his job, he sought work with [Third Party name Redacted] through [Employer redacted] because "Ms. A [Redacted]" assured him that he would get at "least get 40 hours of work and some overtime" with [Third Party name redacted]. Accordingly, Claimant testified that he applied for a position with [Employer redacted], was hired at $16.00/hour and placed with [Third Party Company redacted]. Claimant completed his "Employment Application Form" on January 20, 2022. (Clmt's. Ex. 5, p. 12). He indicated that he was available to start working January 29, 2022. (Resp. Ex. D, p. 7). Claimant agreed that he started working for [Third Party Company redacted] around January 29, 0222.

3. Claimant testified that he suffered a back injury on March 30, 2022, while digging a trench and moving dirt. (*See also*, Clmt's. Ex. 1, p. 2). Following this injury, Claimant completed a "Worker's Claim for Compensation form on March 31, 2022. *Id*. In his claim for compensation, Claimant declared an average weekly wage (AWW) of $720.00. *Id*. Although he was offered modified duty work, Claimant testified that his doctor would not approve the position. Consequently, Claimant testified that he has not worked since the date of his injury.

4. Respondents admitted liability for Claimant's injury as evidenced by a General Admission of Liability (GAL) filed on May 11, 2022. (Clmt's. Ex. 2, p. 4; Resp. Ex. A, p. 1). The May 11, 2022, GAL reflects that Claimant's wages were paid "from DOI (date of injury) through 4/24/2022." *Id*. As Claimant began to lose time from work beginning April 25, 2022, it was necessary for Respondents to calculate his AWW to

insure proper payment of temporary total disability (TTD) benefits.

5. Respondents calculated Claimant's AWW to equal $460.62. (Clmt's. Ex. 2, p. 4; Resp. Ex. A, p. 1). Respondents did not provide a basis for their calculation. Claimant contends that the admitted AWW is incorrect. He maintains that he had a reasonable expectation of getting at least 40 hours of work a week while working for [Third Party Company redacted] based upon his conversation with [Name Redacted, hereinafter Ms. A]. During cross-examination, Claimant suggested that he was not getting his anticipated full 40 hours of work due to weather, i.e. heavy snow/rain affecting the job site and the fact that he had no control over how his supervisor set his working hours.

6. Payroll records admitted into evidence begin with the pay period ending February 6, 2022 and run through the pay period ending April 24, 2022. (Resp. Ex. D, p. 18). As noted, Claimant testified that he has not worked since March 30, 2022. Accordingly, monies paid for the pay period ending April 3, 2022 through the period ending April 24, 2022 reflect the wage continuation referenced in the May 11, 2022 GAL rather than wages for hours worked. Counting the week for the pay period ending February 6, 2022 and including the remaining weeks extending through the period ending March 27, 2022, the last full week of work before Claimant was injured on March 30, 2022, represents a period of eight weeks. Claimant was paid a total of $3,428.00 over this period. *Id.* The payroll records also reflect that during this eight-week period, Claimant only worked a full 40-hour workweek once, i.e. for the pay period ending February 20, 2022. *Id.* Claimant also worked 5.50 hours of overtime for this same pay period. *Id.*

7. Claimant contends that the payroll records admitted into evidence are incorrect and do not accurately reflect the hours he worked. He testified that he worked overtime on at least two occasions whereas the payroll records indicate that he only worked overtime once before his injury. Claimant testified that although he expected he would get 40 hours per week, he did not call Ms. A [Redacted] to complain that his hours were short because he knew the weather was affecting his hours. He suggested that as the weather improved his hours would increase.

8. Ms. A [Redacted] testified as an Account Executive for Employer. She confirmed that Claimant was hired as a construction laborer at $16.00/hr. (*See also*, Resp. Ex. D, p. 12). Ms. A [Redacted] testified that while she anticipated that Claimant could work as many as 40 hours a week for [Third Party Company redacted], she made no promise or guarantee to Claimant that he would get 40 work hours per week plus overtime as he implied. She clarified during cross-examination that she told Claimant that he could work up to 40 hours, weather permitting.

9. Ms. A [Redacted] testified that the hours of [Employer redacted] employees placed with [Third Party Company redacted] vary from week to week. She testified that for the week of March 13, 2022, none of the [Employer redacted]'s employees placed with [Third Party Company redacted] worked a full 40 hours. (Resp.

Ex. D, p. 14). She also testified that out of nine employees placed with [Third Party Company redacted] on March 20, 2022; only four worked a full 40-hour workweek. (Resp. Ex. D, p. 15). For the week ending March 27, 2022, Ms. A [Redacted] testified that three out of sixteen employees placed with [Third Party Company redacted] worked 40 hours. (Resp. Ex. D, p. 16). Finally, the records reflect that Claimant worked 8 hours on March 29, 2022 and 5 hours March 30, 2022. He did not work March 31, 2022, April 1, 2022, or April 2, 2022. No employees placed with [Third Party Company redacted] worked Sunday, April 3, 2022. (Resp. Ex. D, p. 17).[1]

10. Ms. A [Redacted] testified that Employers payroll records cannot be tampered with in the system from which they are produced. She also confirmed that Claimant never called her to inform her that he was not getting his anticipated hours.

11. Ms. A [Redacted] confirmed that Claimant has not worked since March 30, 2022. She confirm that Employer paid Claimant at a rate of $16.00/hour for 40 hours or $640.00 for three weeks after his injury. She no explanation for why Claimant was being paid $640.00 a week for this period.

12. Based upon the evidence presented, the ALJ is not persuaded that Employer lead Claimant to believe that he would get 40 hours of work per week as a construction laborer at [Third Party Company redacted]. In this regard, the ALJ credits the testimony of Ms. A [Redacted] to find that no promises or guarantees of working 40 hours were extended to Claimant. Rather, the ALJ is convinced that Ms. A [Redacted] probably conveyed to Claimant that under [Third Party Company redacted] it was possible that he could work up to 40 hours per week. Nonetheless, the ALJ is convinced that weather probably altered the number of days and hours Claimant was able to work during the late winter and early spring months following his hire on January 22, 2022.[2] In fact, Ms. A [Redacted] seemingly acknowledged as much when she testified that Claimant could work as many as 40 hours per week, "weather permitting."[3]

13. As submitted the March 13, 2022, time sheet contained at Resp. Ex. D, p. 14 supports a finding that weather was likely affecting the entire crew's ability to work during the week of March 7-13, 2022. In fact, no employee worked every day this week, no employee worked 40 hours for the week and no one worked Thursday or Saturday. Moreover, only four of 16 employees worked on Monday and Friday of this week and only eight of 16 employees worked on Tuesday and Wednesday. (Resp. Ex. D, p. 14). While the March 20, 2022 and March 27, 2022 time sheets suggest that there was an improvement in the weather, based on the increased number of days the crew was working and the average number of hours for those employees, Respondents did not submit a time sheet for the week ending February 6, 2022 or

[1] Based upon the time sheets submitted, the ALJ finds to reasonable to conclude that [Third Party Company redacted] is closed on Sundays.
[2] As testified to by Ms. A [Redacted].
[3] Here, the wage records cover a period of typically unsettled weather in Colorado, namely February, March and April.

February 27, 2022. Thus, the number of days and the average number of hours each member of the crew was working is unknown. Nonetheless, it is known that Claimant only worked 18 hours for the week ending February 6, 2022 and 7.50 hours for the week ending February 27, 2022. Based on the information demonstrated by the March 13, 2022 time sheet, the ALJ finds it reasonable to infer that weather was probably affecting the number of hours Claimant was able to work for the weeks ending February 6, 2022 and February 27, 2022. (Resp. Ex. D, p. 18). Because the number of hours Claimant worked for the weeks ending February 6, 2022 and February 27, 2022, are conspicuously below his reported work hours for the balance of the reported period, the ALJ finds these hours to constitute an anomaly in his earnings. Because the earnings from these two weeks do not accurately and fairly represent Claimant's typical earnings, the ALJ finds that it would be manifestly unjust to calculate Claimant's AWW by including these reduced earnings in the overall computation of his AWW. Accordingly, the ALJ elects to exclude these two weeks of earnings, add the remaining earnings in the 8 week period and divide the total by six weeks to arrive at an AWW of $503.33 ($560.00 + $772.00 + $432.00 + $360.00 + $560.00 + $336.00 = $3,020.00 ÷ 6 weeks = $503.33). (Resp. Ex. D, p. 18).

14. Based upon the evidence presented, Claimant has proven that his AWW should be increased from $460.62 to $503.33 as the ALJ finds this figure most closely approximates Claimant's actual wage loss and diminished earning capacity at the time of his March 30, 2022 industrial injury.

CONCLUSIONS OF LAW

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

Generally

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

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

Average Weekly Wage

C. The overall purpose of the average weekly wage (AWW) statute is to arrive at a fair approximation of a claimant's wage loss and diminished earning capacity resulting from the industrial injury. *See Campbell v. IBM Corp.,* 867 P.2d 77 (Colo.App. 1993)[4]; *National Fruit Prod. v. Crespin,* 952 P.2d 1207 (Colo.App. 1997).

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

E. The best evidence of Claimant's actual wage loss and therefore a fair approximation of his diminished earning capacity as of March 30, 2022 comes from the time sheets and wage records admitted into evidence. As found here, careful review of those materials persuades the ALJ that the computation of Claimant's AWW should not include the pay periods ending on February 6, 2022 and February 27, 2022. Here, the evidence presented supports a conclusion that the aforementioned pay periods represent an aberration in Claimant's proven earning capacity, probably due to factors beyond his control, specifically inclement weather and his supervisor's actions regarding the setting of Claimant's work hours. Indeed, the ALJ is convinced that but for the unsettled weather, Claimant likely would have worked the increased hours he testified he felt were coming as the weather improved. Accordingly, the ALJ concludes that it would be unjust to include Claimant's lowered earnings for the pay periods ending February 6, 2022 and February 27, 2022 as they were likely disproportionally affected by the weather at the time. Based upon the evidence presented, the ALJ agrees with Claimant that his AWW should be increased. While the ALJ is not convinced that Claimant is entitled to an increase to $640.00, the evidence supports and increase from $460.62 to $503.33, as this figure represents the fairest approximation of his wage loss and diminished earning capacity at the time of his March 30, 2022 industrial injury.

ORDER

It is therefore ordered that:

1. Claimant has established, by a preponderance of the evidence, that he is entitled to an increase in his AWW from $460.62 to $503.33.

2. Respondents shall pay temporary total disability (TTD) benefits corresponding with an AWW of $503.33 for the time period reflected in the GAL filed May 11, 2022, i.e. from April 25, 2022 and ongoing until such time that the TTD

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

benefits can be terminated in accordance with the provisions of the Colorado Workers' Compensation Act.

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

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

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

DATED: September 13, 2022

/s/ Richard M. Lamphere

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-177-867-001

ISSUES

1. Whether Claimant established by a preponderance of the evidence that Q-SART and thermogram testing for CRPS is reasonable and necessary to cure or relieve the effects of Claimant's July 19, 2021 work injury.

FINDINGS OF FACT

1. Claimant sustained an admitted injury on July 19, 2021, when he caught his left hand in a rope while performing his job duties and sustained a compression/crush injury to the left hand. Claimant's injury occurred when he wrapped a rope around his hand to pull a tarp off of a load of hay he was hauling on a truck.

RELEVANT PRIOR INJURIES AND CONDITIONS.

2. Claimant has a significant history of prior injuries to his left hand, including work injuries to the left hand in March 2012 and February 2017, which resulted in surgeries. Claimant was also diagnosed with a familial tremor of both hands in 1994. As a result of these prior conditions, Claimant had pre-existing diminished sensation in the ulnar distribution of his left hand, an essential tremor, and grip weakness.

3. Claimant's March 2012 work injury occurred when the ulnar aspect of Claimant's left hand was caught between two pipes, necessitating a skin graft and surgery. Claimant was evaluated for an impairment rating by Laura Caton, M.D., on March 28, 2013. Dr. Caton opined that Claimant's grip and motion had "fully recovered" and that he had occasional tingling in the left hand with barometric changes, and skin color changes in cold weather. Dr. Caton assigned an 18% left upper extremity permanent impairment rating and released Claimant from all work restrictions. Dr. Caton found Claimant had a 5% loss of range of motion at the left wrist, and loss of range of motion at the fingers, with the exception of the thumb. (Ex. 37).

4. In August 2012, Claimant was evaluated for possible complex regional pain syndrome (CRPS), through a thermogram, and bone scan, both of which were negative. It was determined Claimant did not have CRPS at that time. (Ex. K, L, M, N).

5. In May 2013, Claimant sustained a non-work-related injury when pulling a garden hose at his home. He experienced a pop in the ulnar wrist and lost sensation over the ulnar aspect of the left hand with swelling. (Ex. 36). No records of additional treatment for this injury were offered into evidence.

6. In February 2017, Claimant sustained an injury to his left thumb resulting in a fracture requiring ORIF surgery. (Ex. P, Q). As of April 2017, Claimant had limited range of motion in his left thumb, but had regained strength in the left hand. Claimant's provider, Malcolm Slaton, PA-C, indicated Claimant's left grip strength was close to his right-hand

grip strength. (Ex. P). On June 21, 2017, Claimant was evaluated by Robert Dupper, M.D., for an impairment rating. Dr. Dupper assigned a 26% left upper extremity impairment rating, which included 24% left thumb range of motion impairment, and complete loss of sensation of the left thumb. Dr. Dupper noted that Claimant had returned to work, and was working with pain and limitations of strength and sensation of the left hand. (Ex. P).

7. In May 2019, Claimant sustained another injury when he fell on his left wrist. Claimant had some tingling in his left arm, but reported that he believed it was due to his prior injuries. (Ex. L). During this timeframe, Claimant was also experiencing severe migraines which were associated with right-sided weakness and numbness. Due to the headaches, Claimant was off work for several months. (Ex. G, L).

8. In his dealings with health care providers related to the July 19, 2021 work injury, Claimant reported his prior injuries and hand conditions to his health care providers.

JULY 19, 2021 INJURY

9. Following his July 19, 2021 injury, Claimant was evaluated at Greeley Hospital, diagnosed with a hand contusion, and placed in a splint. On July 23, 2021, he was evaluated by authorized treating physician (ATP) Oscar Sanders, M.D., at UC Health. Claimant had pain in the thenar eminence and pain in the ulnar aspect of the left hand. Claimant reported tinging in the hand and grip weakness, which he characterized as chronic, but worsened since his injury. (Ex. 26).

10. After his initial evaluation, Dr. Sanders referred Claimant to Bret Peterson, M.D., a hand surgeon at Orthopaedic & Spine Center of the Rockies. Claimant first saw Dr. Peterson on August 5, 2021, and reported ulnar-sided pain and swelling, and noted that he had a pre-existing ulnar nerve injury with diminished sensation and weakness in his hand. Claimant also had pre-existing clawing of the left hand. Claimant's primary complaint at that time was pain in his radial hand and wrist pain. Dr. Peterson recommended an MRI arthrogram, which was negative for ligament tear. (Ex. Q).

11. On August 26, 2021, Claimant saw Dr. Peterson, reporting diminished sensation in the radial nerve distribution over the dorsum of the left hand. Dr. Peterson noted Claimant had baseline clawing of the left hand and a loss of intrinsic function. Dr. Peterson recommended Claimant undergo electrodiagnostic testing for new onset of radial sensory nerve dysfunction. (Ex. 31)

12. On September 29, 2021, Claimant saw Gregory Reichhardt, M.D., for electrodiagnostic testing, which was interpreted as showing chronic/old left ulnar neuropathy, but was otherwise negative. He noted Claimant had preexisting numbness, of the 4th and 5th digits. He also noted mild left-hand swelling and mottling of the skin, with no sweat or temperature changes noted. (Ex. D). Dr. Reichhardt opined that Claimant's symptoms extended "well beyond the distribution of any single nerve," that Claimant's findings were concerning for complex regional pain syndrome (CRPS). He indicated that Claimant met the "Budapest criteria" for CRPS, and referred Claimant for

the performance of Q-SART and thermogram[1] testing for further evaluation. Dr. Reichhardt submitted the request for Q-SART and thermogram testing to Insurer on October 5, 2021. (Ex. D).

13. The Colorado Medical Treatment Guidelines (MTG), for Complex Regional Pain Syndrome (CRPS), W.C.R.P. 17, Ex. 7, provide that patients who meet the "Budapest criteria," defined below, may begin initial treatment for CRPS. The MTG sets out the following criteria as:

- Continuing pain, which is disproportionate to any inciting event; and
- At least one symptom in 3 of the following 4 categories:
    - Sensory: reports of hyperesthesia and/or allodynia;
    - Vasomotor: reports of temperature asymmetry and/or skin color changes and/or skin color asymmetry;
    - Sudomotor/edema: reports of edema and/or sweating changes and/or sweating asymmetry;
    - Motor/trophic: reports of decreased range-of-motion and/or motor dysfunction (weakness, tremor, dystonia) and/or trophic changes (hair, nail, skin).
- At least one site at the time of evaluation in 2 or more of the following categories:
    - Sensory: evidence of hyperalgesia (to pinprick) and/or allodynia (to light touch and/or deep somatic pressure and/or joint movement);
    - Vasomotor: evidence of temperature asymmetry and/or skin color changes and/or asymmetry. Temperature asymmetry showing at least a 1°C difference between the affected and unaffected extremities;
    - Sudomotor/edema: evidence of edema and/or sweating changes and/or sweating asymmetry. Upper extremity volumetrics may be performed by therapist that have been trained in the technique to assess edema; or
    - Motor/trophic: evidence of decreased range-of-motion and/or motor dysfunction (weakness, tremor, dystonia) and/or trophic changes (hair, nail, skin).

- No other diagnosis that better explains the signs and symptoms. It is essential that other diagnoses which may require more urgent treatment, such as infection, allergy to implants, or other neurologic conditions, are diagnosed expediently before defaulting to CRPS.

14. On October 7, 2021, Insurer submitted Dr. Reichhardt's request for Q-SART and thermogram testing to Kathy McCranie, M.D., for review. Dr. McCranie opined that Claimant did not meet the Budapest criteria to begin diagnostic testing because Claimant's pre-existing conditions explained all of his symptoms, with the exception of swelling. Dr. McCranie opined that Claimant's preexisting tremor and weakness were "at

[1] Q-SART testing is an autonomic test measuring sweat, an a thermogram test measures temperature.

baseline," and Claimant had "baseline numbness from an ulnar neuropathy," previous loss of motion evidence by a prior impairment rating, and that his skin changes were explained by the prior ulnar skin graft. Dr. McCranie opined that the bulk of Claimant's findings were not related to his July 19, 2021 work injury. Dr. McCranie's opinion is not persuasive. (Ex. C).

15. On October 12, 2021, Claimant saw Dr. Peterson. Dr. Peterson acknowledged Claimant had a previous injury in 2012 resulting in permanent ulnar nerve dysfunction, and indicated Claimant had consistent pain out of proportion with neurologic involvement. Claimant reported pain in the proximal forearm, dorsal hand, and wrist. Claimant described splotchy colors, altered sweat patterns, and swelling in his left hand. He recommended Claimant undergo a thermogram. He also indicated it would be optimal to obtain a stellate ganglion block to gauge Claimant's response. Dr. Peterson also recommended a carpal tunnel release and radial neurolysis as treatment options. He noted that Claimant's symptoms would likely persist without intervention. (Ex. Q).

16. On October 20, 2021, Dr. Reichhardt responded to Dr. McCranie's opinion in his report from that date, indicating he disagreed with Dr. McCranie's opinion that Claimant's symptoms could not be considered part of Claimant's current Budapest criteria. Dr. Reichhardt opined that Claimant met the Budapest criteria, even accounting for Claimant's preexisting symptoms. Specifically, Dr. Reichhardt indicated that Claimant was reporting increased pain beyond his pre-July 19, 2021 baseline pain. Claimant's post-July 19, 2021 allodynia was on the radial side of the hand, rather than the ulnar side. Claimant's skin changes were also in a different location than his skin graft. He indicated that he did not consider Claimant's tremor as part of his Budapest criteria. Notwithstanding, he opined that Claimant, has subjective reports meeting three of four subjective criteria (allodynia on the radial aspect of the hand, color changes in the hand, edema in the left hand, and increased motor change compared to pre-injury). Objectively, he opined that Claimant met at least two criteria, including allodynia of the radial aspect of the hand, evidence of erythema and increased skin mottling. He noted that Claimant has evidence of mild edema of the left hand, meeting the sudomotor requirement, and significant weakness in the left hand and loss of range of motion. He opined that Claimant met the Budapest criteria even accounting for his prior injuries. (Ex. D).

17. On November 9, 2021, Claimant saw Dr. Peterson and his physician assistant, Jessica Ritengo, PA-C. Dr. Peterson indicated that Claimant "certainly falls into the CRPS spectrum." Claimant reported worsening numbness in his thumb, index and middle fingers beyond his baseline finger numbness. Claimant also reported splotchy colors and altered sweat patterns and swelling of the left hand, and provided video evidence of color change. On exam, Claimant had blotching to left hand to his skin color and tone, and loss of hair over the dorsum and knuckles of the left hand. Dr. Peterson's diagnosis was left upper extremity crush injury, preexisting ulnar nerve neuropathy and dysfunction from previous crush injury, probable CRPS/irritable carpal tunnel syndrome, and compressive radial neuropathy. (Ex. Q).

18. On November 16, 2021, Claimant was seen at the office of Timo Quickert, M.D., for evaluation for a stellate ganglion nerve block. Claimant reported excessive sweating

of the left hand, goosebumps to the left arm, temperature and color changes, and swelling. On examination, Claimant had tenderness with both light and moderate palpation of the left hand, the left hand was cooler than the right, and Claimant had increased erythema in the left hand and forearm, and slight swelling on the left. Dr. Quicker agreed with Dr. Reichhardt that Claimant demonstrated symptoms of CRPS, and recommended two stellate ganglion blocks one week apart, and that Claimant be evaluated by Dr. Reichhardt two hours after the procedure to determine effectiveness. (Ex. 35).

19. On December 3, 2021, Dr. Sanders opined that Claimant has CRPS and that more likely than not the CRPS is reasonably related to Claimant's July 19, 2021 work injury. (Ex. 19).

20. On January 7, 2022, Dr. Quickert performed a left stellate ganglion block without immediate complications. (Ex. B). Approximately two hours later, Claimant saw Dr. Sanders, noting increased pain, numbness, weakness, and tremors. Claimant had significant tachycardia. Dr. Sanders was concerned about Claimant's reaction to the injection and referred him to the UC Health emergency department for evaluation. (Ex. 17). At UCH, Claimant reported developing a left-sided migraine headache, and a left-sided facial droop, which Claimant reported was common with his migraine headaches. Later records from other providers describe Claimant's facial droop as right-sided.

21. On January 12, 2022, Claimant underwent an independent medical evaluation (IME) performed by Scott Primack, D.O., at Respondents' request. As relevant to the present issues in this case, Dr. Primack opined that Claimant does not have CRPS, based on his own examination and the fact that Claimant had no reported improvement or change in function following the stellate ganglion injection. He opined that an autonomic test battery or thermogram were not recommended based on Claimant's history, and examination. Dr. Primack also opined that Claimant was at maximum medical improvement (MMI). (Ex. A).

22. On January 21, 2022, Claimant underwent a neurologic evaluation with Ryan Barmore, M.D., to assess his hand tremor and right-sided facial droop. Claimant reported that since the stellate ganglion block, he had increased pain and weakness in his left arm with intermittent chills. Dr. Barmore noted that Claimant's facial droop was variable and not present when Claimant was distracted by conversation, and that Claimant's hand tremor was intermittent. He indicated that he suspected Claimant's facial droop was the result of a functional movement disorder, but could not rule out an underlying organic disorder related to his hand tremor. He diagnosed Claimant with functional neurological symptom disorder with abnormal movement, and tremor of both hands. (Ex. G).

23. Based on his reaction to the initial stellate ganglion block, Claimant declined to undergo a second block as initially recommended by Dr. Quickert. (Ex. E). Dr. Reichhardt opined that claimant's complication was not fully understood, which raised the risk of a second procedure, and that Claimant did not receive benefit from the first injection, calling into question whether a second injection would be of benefit. (Ex. D). He agreed with Claimant's decision not to undergo a second stellate ganglion block.

24. On February 4, 2022, Dr. Primack issued a second report in which he primarily addressed the reasonableness, necessity and relatedness of carpal tunnel and medial nerve compression surgeries proposed by Dr. Peterson. Dr. Primack opined that such surgeries would not be considered work-related or effective, and that Claimant's current symptoms were related to his pre-July 19, 2021 injuries. (Ex. B).

25. On March 1, 2022, Dr. Sanders indicated he continued to agree that Claimant should continue to be evaluated for CRPS, and that he considered Q-SART and thermogram testing to be reasonable. He indicated Claimant was not at maximum medical improvement because diagnostic testing had not been completed. Dr. Sanders felt a pain psychology evaluation was appropriate as well. (Ex. 14).

26. On March 17, 2022, Dr. Reichhardt noted in his examination report that he had reviewed Dr. Primack's opinion and continued to recommend Q-SART and thermogram testing. He again reiterated that Claimant met the Budapest criteria for CRPS, and that his presentation was made more complex by his pre-existing neurological injury, his functional neurologic disorder, and possible presence of a pain disorder. He acknowledged that although Q-SART and thermogram testing would not likely result in the performance of additional stellate ganglion blocks, or a spinal cord stimulator in the near future, he felt that establishing (or ruling out) CRPS as a diagnosis was reasonable. He indicated a bone scan would be a consideration with a positive Q-SART and/or thermogram. (Ex. 3)

27. On April 11, 2022, Dr. Sanders responded to a letter from Insurer that outlined Dr. Primack's opinion, and asked if Dr. Sanders agreed. In response, Dr. Sanders wrote:

> "[Claimant] has completed multiple evaluations with both Dr. Reichhardt and Dr. Peterson of orthopedic surgery. He has been previously noted to demonstrate signs and symptoms fulfilling the Budapest criteria, to include disproportionate pain/hypersensitivity, swelling, skin mottling, weakness and numbness. It has been noted that patient does have pre-existing ulnar nerve injury findings at baseline. His case has also been complicated by a potential functional neurologic disorder and pain disorder. However, his ongoing pain and dysfunction is a significant elevation from his preinjury baseline. To assist in providing diagnostic clarity, given the complexity of this case, I would strongly agree with proceeding with Q-SART and thermogram to assist in providing the most comprehensive and appropriate care for [Claimant], with the ultimate goal of returning him back to his preinjury baseline functioning and to work."

28. Respondents' presented Dr. Primack's testimony by deposition in lieu of live testimony. He was admitted as an expert in neurology, physiatry, physical medicine, and electrodiagnostic medicine without objection. Dr. Primack's testimony was consistent with his reports. Additionally, he testified, in his opinion, that Claimant's hand pain is the result of a wrist sprain and non-work-related functional neurologic disorder, rather than CRPS. He further testified that the fact that Claimant had a prior chronic nerve injury and a negative response to the stellate ganglion block was enough for him to determine that

Claimant does not need Q-SART or thermogram testing. He testified that if Claimant does not meet the Budapest criteria, Q-SART testing not appropriate, and that in his opinion, Claimant does not meet the Budapest criteria.

29. Dr. Primack testified that although he does not believe Claimant meets the Budapest criteria, if Claimant met the criteria, the results of a thermogram and Q-SART testing would tend to establish whether Claimant's condition was or was not work-related. Specifically, he testified as follows:

> Q: Have you had occasion before, though, when that argument also involves prior testing and prior evidence of all of that Budapest criteria?
>
> A: I'm not sure of your question, but it is not uncommon to see someone who has had a previous nerve injury and then there is another injury, and the concerns are, do they have CRPS? That is not uncommon.
>
> Q: Okay. In this case when we look at the argument about whether or not there is Budapest criteria, if there is Budapest criteria, let's say you are wrong and the other guys are right, if there is, is it probable that that is because of what occurred on July 19, 2021, or is it more probable that it was preexisting, given the testing and the prior medical records that you have?
>
> A: That is a great question. It depends upon the results of the thermogram and the Q-SART, meaning the thermogram, if the unmyelinated C fibers are only seen with the ulnar nerve, then that is CRPS type 2. That would not be a component of the work injury, if it is CRPS type 2 from an ulnar nerve problem because he has had ulnar nerve problems for a long time.
>
> If he has CRPS type 2 where the median nerve lights up, you can make a case that that would be work-related. If you have CRPS type 1, which means you don't have any nerve injury, then that would be considered work-related.
>
> Q: Okay. And you said that would require the median nerve to light up in this testing?
>
> A: It would have to be -- yeah. Well, what happens is, is that the data would look more towards, instead of a diffuse pattern, a specific pattern within a specific nerve dermatome.
>
> Q. Okay.

> A: That is what you would see on the thermogram and the autonomic test battery. So you would be sweating within those areas of the skin that specifically receive median nerve conduction or median nerve electrical input.
>
> Q. Okay. And given the MRI, because you said the MRI that was done, and the EMG that was done so far, do you anticipate that there would be median nerve involvement?
>
> A. No, I don't. But, you know, based upon your question, you know, there would be scenarios that you could analyze.

(Primack Deposition, p. 53, l. 6 - p. 55, l. 2).

30. Dr. Reichhardt testified at hearing and was admitted as an expert in physical medicine and rehabilitation and electrodiagnostic medicine. Dr. Reichhardt's testimony was consistent with his medical records. He testified that he has not diagnosed Claimant with CRPS, but that Q-SART and thermogram testing were reasonable and necessary tests to determine whether Claimant has CRPS. It is possible Claimant does not have CRPS. He testified Claimant's negative response to the stellate ganglion block was not definitive evidence that Claimant does not have CRPS. Dr. Reichhardt testified that Claimant met the Budapest criteria, at his first visit with Dr. Reichhardt, and that he satisfied more criteria as treatment progressed. Dr. Reichhardt opined Claimant ultimately met all objective Budapest criteria. Dr. Reichhardt testified that Claimant's condition could be treated without performance of the Q-SART and thermogram, but that testing will provide a proper diagnosis which will allow better clinical and treatment decisions.

31. At hearing, Claimant's testimony concerning his July 19, 2021 mechanism of injury, and his prior injuries was consistent with his reports of injuries documented in his medical records. Claimant testified before his July 19, 2021 injury, he had approximately 80% grip strength, and was able to perform his work duties. He had pain in the pinkie of his left hand, but had use of his left hand. He testified that he did not have swelling, hair loss or temperature changes in the left hand. He testified he would like to undergo Q-SART and thermogram testing if approved.

CONCLUSIONS OF LAW

Generally

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

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

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

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

Specific Medical Benefits At Issue

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a), C.R.S. A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant's physical needs. *Bellone v. Indus. Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., W.C. No. 4-517-537, (ICAO May 31, 2006). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School Dist.,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012). Diagnostic testing which is reasonable and necessary for treatment of a work-related injury is compensable. *Beede v. Allen Mitchek Feed and Grain*, W.C. No. 4-317-785 (ICAO Apr. 20, 2000). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School Dist.*, W.C. No. 3-979-487, (ICAO Jan. 11, 2012); *Ford v. Regional Transp. Dist.,* W.C. No. 4-309-217 (ICAO Feb. 12, 2009).

Claimant has established by a preponderance of the evidence that Q-SART and thermogram testing are reasonable and necessary to cure or relieve the effects of

Claimant's industrial injury. At issue is whether Claimant meets the appropriate criteria to undergo additional diagnostic testing to determine if Claimant's current condition constitutes CRPS. Claimant has not been definitively diagnosed with CRPS. Dr. Primack and Dr. McCranie have opined that Claimant does not meet the Budapest criteria, rendering Q-SART and thermogram testing unreasonable and/or unnecessary. Conversely, Claimant's treating providers, Dr. Reichhardt, Dr. Sanders, and Dr. Peterson believe Claimant meets these criteria. The ALJ finds the opinions of Dr. Reichhardt, Dr. Sanders, and Dr. Peterson to be more persuasive than those of Dr. Primack and Dr. McCranie, and that Claimant meets the Budapest criteria.

Throughout his treatment and evaluation with his treating health care providers, Claimant has consistently and forthrightly disclosed his prior injuries and conditions. As evidence by the medical records, Dr. Reichhardt, Dr. Sanders, and Dr. Peterson were aware of Claimant's pre-existing conditions, and considered these conditions when determining that Claimant meets the Budapest criteria. Although Claimant has significant pre-existing conditions, and has had multiple prior injuries to his left hand, he was tested for CRPS in 2013 and found not to have the condition.

Dr. Primack testified that although he does not believe Claimant meets the Budapest criteria, if Claimant meets those criteria, the results of a thermogram and Q-SART testing would tend to establish whether Claimant's condition was or was not work-related. Similarly, Dr. Reichhardt testified that performance of Q-SART and thermogram testing would assist in arriving at a definitive diagnosis, and would provide information that would assist in determining the appropriate treatment for Claimant's condition. Taken as a whole, the ALJ concludes that Claimant has established that it is more likely than not that he meets the Budapest criteria, and that Q-SART and thermogram testing is reasonable and necessary to cure or relieve the effects of his industrial injury.

ORDER

It is therefore ordered that:

1. Claimant's request for authorization of Q-SART and thermogram testing is granted.

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

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

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

DATED: September 23, 2022

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

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that he sustained a compensable industrial injury on January 7, 2021.

II. Whether Claimant proved by a preponderance of the evidence that he is entitled to reasonable, necessary and causally related medical treatment.

III. Whether Claimant proved by a preponderance of the evidence he is entitled to temporary disability benefits.

IV. Determination of Claimant's average weekly wage (AWW).

FINDINGS OF FACT

1. Employer is a trucking company that transports trailers for FedEx. Owner is the sole operator of Employer.

2. Claimant began working for Employer as a team driver in February 2020. Claimant's job duties included transporting goods from Denver, Colorado to Omaha, Nebraska, hooking up trailers to trucks using dollies, and truck maintenance. Claimant testified that the dollies weighed approximately 400-600 pounds.

3. Claimant testified that, upon being hired by Employer, he met with Owner at Owner's office and completed paperwork. Claimant testified that one of the documents he completed was a waiver of workers' compensation. Claimant acknowledged that he did not reference any alleged waiver in his discovery responses and did not request a copy of the alleged waiver from Employer through discovery. Claimant did not offer the alleged waiver into evidence. Claimant testified that he mentioned the alleged waiver to his sister, but elected to sign it and start employment because of the pay and his understanding that Employer was a good company.

4. Claimant's older sister, J.V., testified at hearing that Claimant mentioned having signed a workers' compensation waiver sometime early on in his employment with Employer. Claimant lived with J.V. at the time. J.V. graduated law school and works as an auditor for Kaiser Permanente.

5. Owner testified at hearing that he never required Claimant to sign a waiver of workers' compensation. He testified that doing so would be unethical. Owner testified that Employer has dealt with work injuries of employees on prior occasions and had done so appropriately.

6. GL[Redacted] testified at hearing on behalf of Respondents. Mr. GL[Redacted] is Employer's PEO representative. He testified that he has previously handled workers' compensation claims for Employer and has no knowledge of Employer ever requiring an employee to sign a waiver of workers' compensation rights.

7. Claimant regularly worked with another team driver, RS[Redacted]. Claimant and Mr. RS[Redacted] took turns driving and sleeping. Claimant's shifts consisted of driving for 12 hours, being off for a few hours, then going back to work. This occurred approximately five days in a row until he was off for a few days.

8. Claimant testified that he talked to Mr. RS[Redacted] regarding workers compensation on approximately two or three occasions prior to his alleged injury. Claimant testified that Mr. RS[Redacted] informed him that if he was involved in a workers' compensation matter Owner would "f*ck" him. Claimant testified that Mr. RS[Redacted] also seemed to be "against" worker's compensation. Claimant testified that he was not aware of any employees that had work injuries.

9. Mr. RS[Redacted] testified at hearing that he never told Claimant Owner would "f*ck" him on a workers' compensation matter. He testified that he does not recall ever specifically talking with Claimant about workers' compensation. Mr. RS[Redacted] further testified that he was never forced to sign any waiver of workers' compensation, nor was he aware of any other employees that were required to do so.

10. Claimant alleges that he sustained an industrial injury while working for Employer at approximately 8:30 a.m. or 9:00 a.m. on January 7, 2021. Claimant testified that he was lifting a dolly to connect to trailers in the FedEx yard. Claimant testified that he bent down to lift the dolly, grabbed it, and lifted it with his arms and body. He testified that he then twisted his back to attach it the dolly to the cab and felt a pop in his lower back/buttocks area with a burning, tingling and numbness down his leg. There were no witnesses to the event. Claimant testified that, at the time, he believed he simply pulled a muscle and did not think much of it.

11. Claimant did not report the alleged injury to Owner, despite texting with Owner that same morning. Claimant testified he did not report the incident to Owner when it occurred because he did not think it was a serious injury and because he signed a waiver of workers' compensation. Claimant testified that he did not say anything about it to Mr. RS[Redacted] about the incident at the time because of Mr. RS[Redacted]'s alleged prior comment that Owner would "f*ck" him regarding workers' compensation matters.

12. Claimant worked full duty and completed the remainder of his shift on January 7, 2021, as well as his scheduled shifts on January 8 and January 9, 2021. Owner and Mr. RS[Redacted] testified that they did not notice any observable signs that Claimant was injured. Claimant was able to perform his regular job duties during this time.

13. Claimant testified he 'believed' he mentioned the incident to his sister the week of the incident. J.V. testified that, on or around January 10, 2021, Claimant informed her that he hurt his back moving a dolly at work.

14. Claimant took personal time from work January 10, 2021 to January 19, 2021 to travel to Wyoming to be with his father. Claimant testified that his leg symptoms were not as bad while he was in Wyoming because he was not sitting as much. Claimant testified that stretched and iced his lower back in an attempt to alleviate his symptoms.

15. Claimant worked full duty as scheduled from January 19 through January 23, 2021. Claimant testified that his pain worsened when he returned to work and that he was experiencing numbness and tingling. Owner and Mr. RS[Redacted] again testified that they did not notice any observable signs that Claimant was injured. Claimant was able to perform his regular job duties during this time. Claimant was scheduled off and did not work on January 24 and January 25, 2021.

16. J.V. testified that, between January 10 and January 26, 2021 Claimant was acting as if he were in pain. She testified she observed Claimant walking more slowly, and appearing to have a difficult time standing fully upright.

17. Claimant was scheduled to return to work on January 26, 2021. Claimant testified that he was in severe back pain when he woke up that morning. Claimant testified that he went out to his driveway, loaded his personal truck and began driving into work but was experiencing excruciating pain. Claimant testified that he did not feel he could safely drive in that condition. Claimant testified he drove back home, went into his house, sat on the couch, and contacted Owner. At 7:00 a.m. Claimant sent Owner a text message stating, "I'm debating on going to the ER, either tore my hamstring or it's sciatica." (R. Ex. J, p. 94). Both Claimant and Owner testified that they spoke via phone after that text message.

18. Claimant testified that he called Owner and told him "what was going on." Claimant did not specify what exactly he told Owner at that time. He acknowledged that he did not make any mention to Owner regarding the alleged January 7, 2021 incident or an injury at work.

19. Owner testified that, during the conversation on January 26, 2021, Claimant told him that he slipped and fell in his driveway while going to his personal vehicle. Owner testified that the weather conditions were snowy and icy on the morning of January 26, 2021. Owner testified that Claimant did not mention anything to him at the time regarding any alleged work injury.

20. Mr. RS[Redacted] testified that Claimant informed him that he slipped and fell next to his truck at home on January 26, 2021 and had to crawl back to the house.

21. Claimant testified that he did not fall on the morning of January 26, 2021 nor did he sustain any other trauma between January 11 and January 26, 2021. Claimant denies ever telling Owner or Mr. RS[Redacted] that he slipped and fell in his driveway on January

26, 2021. Claimant attributes the symptoms he experienced on January 26, 2021 to the alleged January 7, 2021 work injury.

22. J.V. testified that she recalled Claimant coming home in extreme pain on the morning of January 26, 2021. J.V. was just getting up when Claimant came back into the home. She testified that Claimant did not tell her he fell nor did she see him fall. J.V. did not see any bruising, scratches, tears in his clothing or dirt on Claimant's clothes that morning. J.V. testified that the ground was clear of snow that day.

23. Owner gave Claimant the day off on January 26, 2021. Claimant testified that the pain got so bad that he urinated himself and "blacked out" around 2:00 a.m. on January 27, 2021.

24. J.V. took Claimant to the emergency room at Lutheran Medical Center on the morning of January 27, 2021. Claimant testified that he does not have any recollection of that day, including the visit to the emergency room. Claimant testified he has no recollection of what he told the doctors at the emergency room. He testified that he did not recall anything until waking up at home on January 28, 2021.

25. J.V. testified that she was in the emergency room with Claimant and that he was having a hard time communicating with the hospital staff due to his pain. Despite this alleged difficulty communicating, J.V. testified that Claimant specifically told the nurses and doctors that he injured himself lifting a dolly on January 7, 2021.

26. The Lutheran Medical Center note from January 27, 2021 contains no reference to any incident on January 7th, any incident lifting a dolly, or any work incident. The note states that Claimant presented with

> [s]ymptoms since yesterday. [Claimant] felt feverish and sweaty yesterday. [Claimant] developed numbness to the left foot. He then developed pain from the foot all the way to the low back. It runs up the back of the leg. He denies a history of sciatica. No trauma. No IV drug use. No history of similar issues. He was incontinent of urine and felt he could not feel or hold his bladder last night. He has never had this issue. Symptoms are moderate and constant.

(R. Ex. E, p. 11).

27. The clinician noted a normal heart rate. Claimant was found to be alert and oriented with no acute distress. A lumbar MRI was performed, which revealed L4-L5 and L5-S1 stenosis due to congenitally short pedicles "confounded by [a] small disc herniation at L4-L5 and large [disc herniation] at L5-S1 with radiculopathy." (See Id. at p. 23). Claimant was provided pain medications and steroids and was referred for a neurosurgery consult.

28. Claimant saw neurologist Mark Magner, M.D. at 3:15 p.m. that same day. Dr. Magner noted an acute onset of symptoms on January 26, 2021, but also noted that Claimant had lower back pain for three days, and numbness, tingling and burning sensation in his left leg for a week. He documented that Claimant was calm, bright and alert. Dr. Magner diagnosed Claimant with spinal stenosis of the lumbar region with radiculopathy and lumbar disc herniation with radiculopathy. He remarked, "Given the hyper-acute timing and also he is not in extremis, we both agreed to try conservative measures." (Id.) Dr. Magner prescribed Claimant medication and referred him for physical therapy.

29. Claimant later called Owner January 27, 2021. Despite his initial testimony that his first recollection after he blacked out was on the morning of January 28, 2021, Claimant testified about this call, stating that he spoke with Owner to inquire about workers' compensation coverage and that Owner told him his injury would not be covered by worker's compensation because he went to the hospital from his house and not from work. Claimant testified that he did not recall telling Owner about the alleged January 7, 2021 work incident during this telephone call. He, nonetheless, testified that he recalled Owner telling him during this call that "You can't be lifting anymore dollies after this."

30. J.V. testified that she heard a telephone conversation on speakerphone between Claimant and Owner on January 27, 2021 in which Claimant "definitely" reported a work injury to Owner.

31. Owner testified that Claimant called him from Lutheran Medical Center on January 27, 2021 inquiring if his condition was work-related since he was heading to work when he fell. Owner informed Claimant that it was not work-related since his fall occurred at home. Owner testified that, at that time, Claimant never said anything to him about hurting himself while lifting a dolly or injuring himself at work.

32. Claimant subsequently sought treatment at Kaiser Permanente. Claimant presented to James Welle, M.D. on February 1, 2021 with complaints of radicular back pain. Dr. Welle noted "Patient reported symptoms restarting around his ed visit on 1/27/21. This is new for him. Withotu (*sic*) trauma." (R. Ex. F, p. 26). Although Claimant testified that he told Dr. Welle about his January 7, 2021 work injury at this appointment, the medical record from this date does not include any reference to a specific incident or any work incident. Dr. Welle diagnosed Claimant with a lumbar disc herniation and radiculopathy and chronic anxiety and referred Claimant for physical therapy.

33. A physical therapy note dated February 11, 2021 documents, "[Claimant] is a 32 year old male who presents with the complaint of: L LE pain starting on 1-27-2021 after walking and the L LE collapsed." (Id. at p. 31).

34. Dr. Welle reexamined Claimant on February 23, 2021. At this exam, Claimant reported that his injury occurred at work. Dr. Welle noted,

> First seen in ED, then referred to nsgy at SCL; Then came back in house; Was going to work; had symptoms of leg pain and numbness the week before; was pully (*sic*) dolly, felt pop in back, on older truck; has been sitting for 9 hours and thought that had pulled something; started having pain in the left leg; started stretching afterwards; then started noticing the burning back down the leg; the following week, started getting numbness from the foot; had time off; employed by [Employer] contacted (*sic*) to FedEx[.]"

(R. Ex. F, p. 37).

35. Claimant last saw Dr. Welle on February 23, 2021. On March 2, 2021, Dr. Welle issued a letter stating that, based on the description of events, his physical examination, and imaging studies, Claimant's disc herniation and resulting pain and disability resulted from his work duties.

36. Claimant continued at Kaiser Permanente for two chiropractic treatments on March 3 and March 8, 2021. During these appointments, Claimant continued his description of his injury occurring after lifting a dolly. However, he also stated they injury occurred approximately six weeks prior.

37. Owner testified that he spoke to Claimant on a daily basis after January 26, 2021 and, during that time, Claimant never changed his story to him that his injury occurred during a slip and fall in his driveway. Owner testified that approximately one month after January 26, 2021, Claimant and J.V. called him requesting workers' compensation paperwork.

38. Claimant and J.V. testified they requested workers' compensation paperwork from Owner on two or three occasions prior to being provided the paperwork.

39. Claimant filed a claim for worker's compensation on March 12, 2021 stating that he injured himself while hooking up a dolly on January 7, 2021.

40. Owner testified that his receipt of the claim for worker's compensation was the first time he was made aware Claimant was alleging a work injury occurred on January 7, 2021 lifting a dolly. Owner testified that, if Claimant would have reported a work incident to him, he would have completed an accident report and followed Employer's procedures.

41. Claimant subsequently selected Injury Care Associates as his authorized provider and presented to Martin Kalevik, D.O. on March 30, 2021 and April 6, 2021. Claimant reported that he felt a pop and burning sensation in his lower back while moving a dolly at work on January 7, 2021. Claimant denied having any falls or direct trauma. Dr. Kalevik assessed Claimant with lumbosacral radiculopathy and opined that Claimant sustained a work-related injury. He referred Claimant for physical therapy and an evaluation with Samuel Chan, M.D. Dr. Kalevik placed Claimant on work restrictions.

42. Dr. Chan evaluated Claimant on May 19, 2021. Claimant continued to report that he injured himself lifting a dolly on January 7, 2021 while at work. Dr. Chan requested authorization for steroid injections, which were denied due to Claimant's claim being contested.

43. Claimant treated by Thomas Robinson, PT on six occasions from April 22 to May 27, 2021. Claimant reported to PT Robinson that he injured his back lifting a dolly at work on January 7, 2021.

44. Dr. Kalevik changed medical offices and Claimant's care was transferred to Margaret Irish, D.O. Claimant first saw Dr. Irish on April 29, 2021. Claimant reported that he injured his back lifting a dolly on January 7, 2021. Dr. Irish found Claimant's lumbosacral radiculopathy work-related and continued his physical therapy and work restrictions. Dr. Irish's notes indicate that, at the time of treatment, she had emergency room records and the records of Dr. Magner.

45. On October 5, 2021, Dr. Irish issued a letter after reviewing additional records. Dr. Irish wrote that, at her May 20, 2021 visit, she did not have statements from Employer or medical records indicating Claimant had fallen at home on January 26, 2021, nor medical records from the neurosurgeon stating that there were congenital issues. Dr. Irish noted that, in reviewing those records, it appeared clear that Claimant had pre-existing lumbar spine degenerative/congenital changes. She opined that Claimant had a pre-existing back condition and that he fell outside while getting into his personal truck. She concluded that, while Claimant may have had a mild exacerbation of his low back pain from lifting a dolly on January 7, 2021, such exacerbation would have resolved in a few weeks. Dr. Irish opined that Claimant's back condition was not causally related to his employment.

46. Claimant did not return to work for Employer due to his back condition and restrictions. In November or December 2021 Claimant returned to work as a truck driver for a different employer. He sustained an injury in January 2022 to his back and subsequently quit employment as a truck driver.

47. Dr. Kalevik testified at hearing on behalf of Claimant. Dr. Kalevik is Level II accredited and board certified in family medicine. He testified that, based on Claimant's reported history, presentation, examination, and imaging, Claimant's injury is work-related. Dr. Kalevik testified that there are objective findings on MRI and examination of a lumbar disc herniation and radiculopathy. Dr. Kalevik explained that, while Claimant probably had pre-existing degenerative lumbar changes, an acute event had to occur in order to result in Claimant's disc extrusion and radiculitis. Dr. Kalevik testified that there was no evidence that Claimant underwent any treatment to his back prior to the alleged work injury. Dr. Kalevik testified that he did not review all of the Kaiser Permanente records but that he had seen employee statements regarding the relatedness of Claimant's alleged work injury. Dr. Kalevik explained that his opinion that Claimant sustained a January 7, 2021 work injury was based in part on Claimant's reported history. He acknowledged that the emergency room records from January 27, 2021 do not note a January 7th incident or work injury. Dr. Kalevik acknowledged that there was not an

objective way for him to tell whether Claimant was injured at work on January 7, 2021 or at home on January 26, 2021.

48. PT Robinson testified at hearing that Claimant's description of his injury to him seemed honest and was consistent with Claimant's symptoms. PT Robinson testified that he believes Claimant's injury is work-related. PT Robinson acknowledged that he is not Level II accredited or trained by the DOWC to make a causation opinion. He acknowledged that falls can cause disc herniations and there would very definitely be a severe onset of symptoms with a disc herniation.

49. Dr. Irish testified at hearing on behalf of Respondents as a Level II accredited expert in occupational medicine. Dr. Irish testified consistent with her October 5, 2021 letter and continued to opine that Claimant's condition is not work-related. She testified that Claimant did not mention any work injury on his initial evaluations. She explained that the medical records from that visit indicate that Claimant's blood pressure and pulse were not unusually high, and that his and exam was fairly unremarkable, contradicting Claimant's testimony that he was in so much pain at the time that he blacked out. Dr. Irish explained that Claimant has congenitally short pedicles which can compress the spinal cord and result in pain and sometimes numbness and tingling. She further explained that a disc herniation can be acute or chronic, and that lifting a dolly or falling can cause herniations.

50. Claimant testified that he did not have any back injuries or back problems prior to the work injury. Claimant alleges that Mr. RS[Redacted] "sucked up" to Owner. Claimant testified that Owner offered to pay for Mr. RS[Redacted]'s wife's plane ticket and their mortgage issues. Claimant further testified about an incident on August 21, 2021 when he accidently hit a FedEx trailer with his work truck and reported it to Owner. Claimant alleges that Owner did not report the incident to FedEx as required by Employer's contract with FedEx. Claimant acknowledged he has never reported a January 7, 2021 work injury to Owner, Mr. RS[Redacted] or anyone else at Employer. Claimant admitted he has several lawyers in his family, including his father, who owns a law firm that represents claimants in workers' compensation claims.

51. Owner testified that he did give Mr. RS[Redacted] a payday advance in the past and offered to help him in other ways like allowing him to stay at his home and buy a plane ticket. Owner attempted to assist his workers that needed assistance. Regarding the August 21, 2021 incident, Owner explained that he reported the incident to FedEx as required.

52. MC[Redacted] worked at FedEx at the time and testified at hearing that Owner did inform her of the August 21, 2021 incident, that she personally looked at the truck and determined there was not significant damage warranting filing of a written report. She testified that, although the written policy is to submit a written report, that sometimes does not occur due to being busy and understaffed. Ms. MC[Redacted] testified that there was no issue with how Owner handled the August 21, 2021 incident or with Owner failing to report incidents to FedEx as required.

53. Mr. RS[Redacted] confirmed that Owner has given him payday advances, which he paid back. He testified that he does not owe Employer any money and that he has no financial interest in testifying against Claimant.

54. The ALJ finds the testimony of Dr. Irish, Owner, Mr. RS[Redacted], Mr. L[Redacted] and Ms. MC[Redacted], as supported by the records, more credible and persuasive than the testimony of Claimant, J.V., and Dr. Kalevik.

55. The ALJ finds that Claimant failed to prove it is more probable than not he sustained a compensable work injury arising out of and in the scope of his employment for Employer on January 7, 2021.

56. Evidence and inferences contrary to these findings were not credible and persuasive.

CONCLUSIONS OF LAW

Generally

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

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

testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

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

Compensability

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

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

The medical records establish that Claimant suffered from small and large disc herniations with radiculopathy. While Claimant purports that he sustained a work injury on January 7, 2021, Respondents witnesses allege Claimant specifically told them his injury was the result of a slip and fall at home. There is a two-week time period from when Claimant alleges he injured his back at work to when he sought medical treatment and became disabled. Both Claimant's reported mechanism of injury and a slip and fall could

result in Claimant's condition and pathology. Accordingly, this case effectively turns on the credibility of the witnesses.

As found, Claimant and J.V. are less credible and persuasive than Respondents' witnesses. Claimant's testimony is refuted by the credible testimony of Owner and Mr. RS[Redacted]. Claimant purports that he signed a waiver of workers' compensation, which he did not refer to in discovery nor offer as evidence. Owner credibly testified that there was no such waiver. Mr. RS[Redacted] and Mr. GL[Redacted] credibly testified that they also were not aware of Employer having employees sign a waiver of workers' compensation. Claimant further testified that he was not aware of any other workers sustaining work injuries but contends that he and Mr. RS[Redacted] randomly discussed workers' compensation and that Mr. RS[Redacted] informed him that Owner would "f*ck him" on a workers' compensation claim. Mr. RS[Redacted] credibly testified he never made such statement to Claimant. Thus, these stated reasons for failing to report his alleged work injury to Employer are incredible.

While Claimant's sister, J.V., testified that Claimant appeared to be in pain from January 10, 2021 to January 26, 2021, Owner and Mr. RS[Redacted] credibly testified that they did not observe any issues with Claimant during that timeframe. Claimant was able to perform his regular work duties at that time. Claimant was not disabled nor did he seek any treatment until January 27, 2021. Claimant effectively alleges that, on January 26, 2021, his symptoms from the alleged January 7, 2021 work injury significantly worsened without any specific reason or trauma. He purports that he woke up in significant pain, attempted to go to work, and was unable to do so. Claimant's story is contradicted by the credible testimony of both Owner and Mr. RS[Redacted], who credibly testified that Claimant personally told them that he slipped and fell by his truck while at home on January 26, 2021. Claimant admitted that he did not report a January 7, 2021 work injury to Employer. Owner was unaware that Claimant was alleging a January 7, 2021 work incident until receiving workers' compensation paperwork from Claimant several months later. When Claimant inquired about workers' compensation coverage, it was with respect to whether his fall at home could be covered, not an alleged January 7, 2021 work injury.

Prior to February 11, 2021, the medical records are devoid of any mention of a work injury or work incident on January 7, 2021. While Claimant testified that he was in so much pain that he "blacked out" and did not remember anything from the emergency room visit on January 27 2021 until the next morning, the medical records from January 27, 2021 document that Claimant was alert and oriented. Dr. Irish credibly testified that certain normal exam findings contradicted Claimant's testimony that he was in so much pain at the time that he blacked out. Moreover, Claimant contradicted himself when he testified that he blacked out and did not remember anything until the morning of January 28, 2021, but then testified to remembering the specific telephone conversation he had with Owner on January 27, 2021 in which he inquired about workers' compensation and the Owner told him he could no longer lift dollies. Furthermore, Claimant's testimony that he was "blacked out" at the emergency room and J.V.'s testimony that Claimant was having difficulty communicating due to his pain does not comport with her testimony that Claimant specifically told multiple emergency room providers that he sustained an injury

on January 7, 2021 while lifting a dolly at work. J.V.'s testimony that Claimant "definitely" reported a January 7, 2021 work injury to Employer is controverted by Claimant's own testimony that he did not report such work injury to Employer.

Based on the totality of the evidence, it is more likely than not Claimant slipped and fell at home, causing his disability and need for medical treatment. The preponderant evidence does not establish that Claimant sustained an injury arising out of and during the course of his employment on January 7, 2021. The preponderant evidence does not establish that Claimant's condition, disability and need for medical treatment was caused, aggravated, accelerated, or exacerbated by a work injury. Accordingly, Claimant's claim shall be denied and the remaining issues are moot.

ORDER

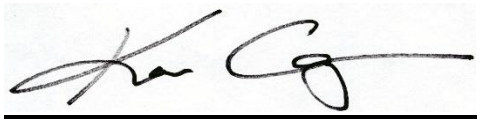
1. Claimant failed to prove it is more probable than not he sustained a compensable industrial injury arising out of and in the course of his employment on January 7, 2021.

2. Claimant's claim is denied and dismissed.

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

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

DATED: September 26, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUE

Whether Claimant has produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of Douglas C. Scott, M.D. that he warranted a 0% whole person permanent impairment rating as a result of his December 8, 2020 admitted industrial injury.

FINDINGS OF FACT

1. Claimant is a firefighter who has worked for Employer since 1994. Claimant was diagnosed with renal cancer while treating for kidney stones in 2020. He reported his condition to Respondent on December 10, 2020.

2. At the time Claimant reported his diagnosis, he had already undergone surgical treatment for his renal cancer on December 8, 2020. The surgery was performed by Justin Green, M.D. and consisted of a right robotic assisted laparoscopic partial nephrectomy. The nephrectomy removed approximately 20% of Claimant's right kidney.

3. After reporting his cancer diagnosis to Employer, Claimant selected Alisa Koval, M.D. at Denver Health – Center for Occupational Health and Safety (COSH) as the Authorized Treating Physician (ATP). Claimant first visited Dr. Koval on December 18, 2020. Dr. Koval noted Claimant's recent surgery and that he was presenting to establish a Workers' Compensation claim. She determined Claimant had no residual symptoms and would likely soon be cleared to return to duty.

4. On January 8, 2021 Claimant returned to Dr. Koval for an examination. Dr. Koval stated "[Claimant] reports feeling well. He has recovered from his kidney procedure and has been cleared by his surgeon to resume activity. He may RTW for a trial of full duty at this time." On February 26, 2021 Dr. Koval placed Claimant at Maximum Medical Improvement (MMI) with no permanent impairment and no work restrictions. She recommended maintenance care in the form of follow-up with urology as needed.

5. Following an investigation and review of the relevant medical records, Respondent determined Claimant's renal cancer satisfied the criteria for the firefighter presumption under §8-41-209, C.R.S. On April 8, 2021 Respondent thus filed a General Admission of Liability (GAL). Respondent covered Claimant's lost work time from December 8, 2020 through January 7, 2021.

6. At the request of the claims adjuster, Claimant returned to Dr. Koval on December 10, 2021. The adjuster asked Dr. Koval to perform an impairment rating or clarify her position on impairment. Dr. Koval noted Claimant had no symptoms and was not clear on the purpose of the visit. In addressing impairment, Dr. Koval explained that "the upper urinary tract is graded by deterioration of renal function; his renal function is

nominal, and he does not meet criteria for the lowest class of impairment (Class I, pg. 20 I, AMA Guides 3rd Edition)."

7. On December 20, 2021 Respondent filed a Final Admission of Liability (FAL) consistent with Dr. Koval's MMI and impairment determinations. Claimant challenged the FAL and sought a Division Independent Medical Examination (DIME).

8. On March 11, 2022 Claimant underwent a DIME with Douglas C. Scott, M.D. After obtaining a detailed history and reviewing Claimant's medical records, Dr. Scott agreed that Claimant reached MMI on February 26, 2021 with a 0% whole person permanent impairment. In calculating the impairment, he reasoned:

> Using the AMA Guides to the Evaluation of Permanent Impairment, revised 3rd edition, and referencing Chapter 11 on The Urinary and Reproductive System, Section 11.1 on the upper urinary tract and referencing Table 1: Classes of upper Urinary Tract Impairment, page 201, [Claimant] has a Class 1 impairment of the whole person of 0% person, i.e. he has no diminution of upper urinary tract function or symptoms and signs of upper urinary tract dysfunction with no requirement of continuous treatment or surveillance. Therefore, [Claimant] has 0% whole person permanent impairment for his surgically removed renal cancer. Apportionment is not applicable.

Dr. Scott agreed with Dr. Koval that Claimant should undergo yearly follow-up care with his oncologist.

9. On March 17, 2022 Respondent filed an amended FAL consistent with Dr. Scott's MMI and impairment determinations. Claimant objected and sought a hearing to overcome the DIME opinion. He asserted he suffered permanent impairment as a result of the partial removal of his right kidney.

10. In support of his position, Claimant presented reports and testimony from Annyce S. Mayer, M.D. At hearing, Dr. Mayer testified as an expert in occupational medicine and as a Level II accredited physician. Dr. Mayer determined that Claimant sustained a 4% whole person impairment as a result of the nephrectomy. She specifically determined that her impairment consisted of a 2% whole person rating for partial removal of the kidney along with a 2% discretionary impairment due to the presence of cancer in the kidney under Section 11.1, Table 1, Class 1 (page 201) of the *American Medical Association Guides to the Evaluation of Permanent Impairment, Third Edition (Revised)* (*AMA Guides*). Notably, Table 1, Class 1 permits up to a 10% discretionary whole person rating. The ratings combined to yield a total 4% whole person impairment.

11. In an April 21, 2022 letter, Dr. Mayer provided the following basis for her rating:

> The following calculation was made based on the operative and surgical reports and kidney dimensions in volunteers without known kidney disease (Emamian, 1993). The average length of the right kidney in males aged 30-

> 60 years was about 115 mm. The length of the right kidney for a person of his height of 186 cm was also about 115 mm. The surgical pathology specimen from [Claimant's] right kidney was 2.2 x 2.2 x 1.7 cm. This represents an approximately 19% loss of the right kidney. In my medical opinion, this is equal to 2% whole person impairment for loss of kidney structure, which along with consideration of that while continuous surveillance is not needed, periodic surveillance by his oncologist will be required on an ongoing basis. Considering all factors, I consider him to have a 4% whole person impairment of the Upper Urinary Tract.

12. Dr. Mayer testified at the hearing in this matter consistent with her written opinions. She addressed a sub-note to Table 1. The note reads "[t]he individual with a solitary kidney, regardless of cause, should be rated as having 10% impairment of the whole person. This value is to be combined with any other permanent impairment (including any impairment in the remaining kidney) pertinent to the case under consideration." Dr. Mayer then utilized Dr. Green's surgical report that noted the size of the specimen removed from Claimant measures 2.2 x 2.2 x 1.7 cm. Using a study on average kidney size, Dr. Mayer estimated the loss represented 20% of Claimant's right kidney. She reasoned that, if complete loss of a kidney, even without concurrent loss of renal function, is rated at 10% impairment of the whole person, then 20% loss of a kidney should be rated at 2% impairment of the whole person.

13. Dr. Mayer further explained that Claimant sustained a discretionary impairment under Section 11.1, Table 1, Class 1. Section 11.1, Table 1, Class 1 allows for up to 10% impairment of the whole person for either: (1) "Diminution of upper urinary tract function" that can be objectively measured; or (2) "Intermittent symptoms and signs of upper urinary tract dysfunction are present that do not require continuous treatment or surveillance." Dr. Mayer remarked that Claimant did not have measurable diminution of upper urinary tract function and thus did not qualify for impairment under the first category of Class 1. However, she further commented that Claimant exhibited signs of upper urinary tract dysfunction in the form of measurable kidney loss and required periodic monitoring for his kidney. Therefore, Claimant warranted a 2% discretionary whole person rating for impairment under the second category of Class 1.

14. Dr. Mayer concluded that, by combining the 2% rating from the sub-note to Table 1 and the 2% rating from Section 11.1, Table 1, Class 1 Claimant suffered a 4% whole person impairment as a result of his December 8, 2020 admitted industrial injury and subsequent surgery. She reasoned that DIME Dr. Scott failed to properly apply the *AMA Guides*. Dr. Scott specifically did not consider Claimant's structural loss from his surgery for renal cancer and the required ongoing surveillance of his cancer by an oncologist. He also failed to take into account the loss Claimant sustained to his kidney structure that gave rise to his needed maintenance care due to the safety aspects of the loss of a portion of the kidney.

15. Claimant has failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Scott that he warranted a 0% whole person permanent impairment as a result of his December 8, 2020 admitted industrial injury. Dr. Scott's

DIME opinion is well-reasoned, based on a review of the records and an analysis of Claimant's symptoms, and relies on the proper portions of the *AMA Guides*. Dr. Scott correctly determined that Claimant has no diminution of upper urinary tract function and therefore does not qualify for a rating under the first portion of Section 11.1, Table 1, Class 1. He also noted Claimant has no symptoms of upper urinary tract dysfunction and does not qualify for a rating under the second portion of Section 11.1, Table 1, Class 1.

16. Dr. Scott's statement that Claimant "has a Class 1 impairment of the whole person of 0% person, i.e., he has no diminution of upper urinary tract function or symptoms and signs of upper urinary tract dysfunction with no requirement of continuous treatment or surveillance," is not a misstatement of fact. The statement is part of Dr. Scott's rationale for his impairment rating and is reasonably construed as reflecting that Claimant has no impairment under Section 11.1, Table 1, Class 1. Dr. Scott was merely quoting the relevant portion of the *AMA Guides* under which Claimant has no impairment. Furthermore, Dr. Scott's impairment rating is mirrored in rationale by the impairment rating of the ATP Dr. Koval. She noted that Claimant's renal function is nominal, and he does not meet criteria for the lowest class of impairment.

17. Dr. Scott's DIME opinion is not required to contain an analysis of every conceivable way Claimant could receive an impairment rating through a physician's exercise of discretion. His failure to address impairment under the provision that provides impairment for total loss of a kidney does not constitute error. He found Claimant had only a portion of his kidney removed. Under the plain language of the *AMA Guides* the removal of a portion of a kidney does not qualify for impairment. The section requires the total removal of a kidney. Dr. Scott therefore reasonably elected not to discuss why he did not exercise discretion to find impairment under an inapplicable portion of the *AMA Guides*.

18. In contrast to Dr. Scott's DIME opinion, Dr. Mayer determined that Claimant sustained a 4% whole person impairment as a result of the nephrectomy. She specifically determined that her impairment rating consisted of a 2% whole person impairment for partial removal of the kidney along with a 2% discretionary impairment due to the presence of cancer in the kidney under Section 11.1, Table 1, Class 1 (page 201) of the *AMA Guides*. Dr. Mayer concluded that, by combining the 2% rating from the sub-note to Table 1 and the 2% rating from Section 11.1, Table 1, Class 1 Claimant suffered a 4% whole person impairment as a result of his December 8, 2020 admitted industrial injury and subsequent surgery. She reasoned that DIME Dr. Scott failed to properly apply the *AMA Guides*. Dr. Scott specifically did not consider Claimant's structural loss from his surgery for renal cancer and his required ongoing surveillance of his cancer by an oncologist. He also failed to take into account the loss Claimant sustained to his kidney structure that gave rise to required maintenance care due to safety concerns about the loss of a portion of the kidney.

19. Like Dr. Scott, Dr. Mayer also recognized that Claimant's renal function remains normal and he had no loss of function from the surgery. Signs, in the absence of symptoms, are inadequate to warrant an impairment rating under Section 11.1, Table 1, Class 1. Dr. Mayer also agreed that Claimant had no symptoms, but only signs, of upper urinary tract dysfunction. However, in the absence of both signs and symptoms of upper

urinary tract dysfunction, a rating under Table 1, Class 1 cannot be applied. Furthermore, Dr. Mayer incorrectly applied Table 1, Class 1 by testifying that a rating should be provided for periodic monitoring (as opposed to continuous monitoring), while Table 1, Class 1 actually reads that impairment "does not require continuous treatment or surveillance." Monitoring only becomes a factor in assigning a rating if the injured worker's impairment falls under Section 11.1, Table 1, Class 2 or higher.

20. Despite Dr. Mayer's opinion awarding a 2% whole person impairment for loss of a portion of the kidney, the *AMA Guides* note that an additional 10% whole person impairment is only for the "solitary kidney" i.e., total loss of a kidney. There is no mention in the *AMA Guides* of proportional impairment for partial loss of a kidney. The *AMA Guides* specify a detailed basis for impairment ratings, and frequently provide for impairments based on partial losses of body parts or function. However, where there is no discussion of proportionate impairment for partial losses, it is reasonable to read the *AMA Guides* as suggesting no impairment. The preceding interpretation is supported by the examples in Chapter 11 page 200. The examples show that in cases where there is partial loss of a kidney (Ex. 2 "marked diminution in size of one kidney" and Ex. 1 "contracted kidneys"), the corresponding impairment ratings lack a component for a proportionate amount of the 10% impairment for total loss of a kidney.

21. Finally, although Dr. Mayer relied on the discretion given to rating physicians to use the *AMA Guides* as a starting point for a final impairment rating, Drs. Scott and Koval also had the same discretion and declined to find impairment. Drs. Scott and Koval chose not to rate Claimant for a partial loss of the kidney without concurrent loss of renal function. Dr. Mayer's opinion to the contrary thus merely represents a difference of professional opinion and does not constitute clear and convincing evidence to overcome Dr. Scott's DIME opinion.

22. Claimant has failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Scott. Claimant has offered the opinion of Dr. Mayer with a different rationale for impairment. Dr. Mayer's reasoning represents an alternate application of the *AMA Guides* that is distinct from Dr. Scott's DIME opinion. To the extent Dr. Mayer's opinion is a plausible exercise of discretion by a rating physician, it constitutes a mere difference of opinion and does not reflect clear error on the part of Dr. Scott. The record reveals that Dr. Scott correctly determined that Claimant warranted a 0% whole person impairment rating. Accordingly, Claimant has failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Scott's determination that Claimant suffered a 0% permanent impairment as a result of his December 8, 2020 admitted industrial injury and subsequent surgery is incorrect.

CONCLUSIONS OF LAW

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

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

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

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

4. In ascertaining a DIME physician's opinion, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Indus. Claim Appeals Off.,* 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's determination regarding MMI and permanent impairment consists of his initial report and any subsequent opinions. *In Re Dazzio,* W.C. No. 4-660-149 (ICAO, June 30, 2008); *see Andrade v. Indus. Claim Appeals Off.,* 121 P.3d 328 (Colo. App. 2005).

5. A DIME physician is required to rate a claimant's impairment in accordance with the *AMA Guides*. §8-42-107(8)(c), C.R.S.; *Wilson v. Indus. Claim Appeals Off.,* 81 P.3d 1117, 1118 (Colo. App. 2003). However, deviations from the *AMA Guides* do not mandate that the DIME physician's impairment rating was incorrect. *In Re Gurrola,* W.C. No. 4-631-447 (ICAO, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation from the *AMA Guides* in determining the weight to be accorded the DIME physician's findings. *Id.* Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett,* W.C. No. 4-677-750 (ICAO, Apr. 16, 2008).

6. A DIME physician's opinions concerning MMI and impairment carry presumptive weight pursuant to §8-42-107(8)(b)(III), C.R.S.; *see Yeutter v. Indus. Claim Appeals Off.*, 487 P.3d 1007, 1012 (Colo. App. 2019). The statute provides that "[t]he finding regarding [MMI] and permanent medical impairment of an independent medical examiner in a dispute arising under subparagraph (II) of this paragraph (b) may be overcome only by clear and convincing evidence." *Id.* Both determinations require the DIME physician to assess, as a matter of diagnosis, whether the various components of the claimant's medical condition are causally related to the industrial injury. *See Eller v. Indus. Claim Appeals Off.*, 224 P.3d 397 (Colo. App. 2009); *Qual-Med, Inc. v. Indus. Claim Appeals Off.*, 961 P.2d 590 (Colo. App. 1998). Consequently, when a party challenges a DIME physician's determination of MMI or impairment rating, the finding on

causation is also entitled to presumptive weight. *Egan v. Indus. Claim Appeals Off.*, 971 P.2d 664 (Colo. App. 1998).

7. "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc.,* 961 P.2d at 592. In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); *see Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAO, Nov. 17, 2000).

8. Section 11.1 of the *AMA Guides* addresses the upper urinary tract. The Section specifies the following:

> from a physiologic point of view, an individual with a solitary kidney may have no actual impairment of renal function; nevertheless, with that condition there exists an absence or loss of the normal safety factor that may be of potential significance in evaluating impairment, depending on the cause of the condition. The individual with a solitary kidney, regardless of cause, should be rated as having 10% impairment of the whole person because of a structural loss of an essential organ. This value is to be combined with any other permanent impairment, including any impairment in the remaining kidney, to determine the individual's impairment.

9. Section 11.1, Table 1, Class 1 delineates criteria for evaluating impairment of the upper urinary tract. Section 11.1, Class 1 notes, in relevant part:

> Class 1—Impairment of the Whole Person, 0-10%: A patient belongs in Class I when (a) diminution of upper urinary tract function is present, as evidenced by creatinine clearance of 75 to 90 liters/24 hr (52 to 62.5 ml/min) or PSP excretion of 15% to 20% in 15 minutes; or (b) intermittent symptoms and signs of upper urinary tract dysfunction are present that do not require continuous treatment or surveillance.

The sub-note to Table 1 specifically provides, in relevant part:

> The individual with a solitary kidney, regardless of cause, should be rated as having 10% impairment of the whole person. This value is to be combined with any other permanent impairment (including any impairment in the remaining kidney) pertinent to the case under consideration.

10. In challenging Dr. Scott's DIME opinion, Dr. Mayer relied on the Division of Workers' Compensation (DOWC) Desk Aid#11 Impairment Rating Tips. The Rating Tips provide, in relevant part:

> **Impairment rating for Workers Who Have Undergone an Invasive Treatment Procedure:** The rating physician should keep in mind the *AMA Guides, 3rd Edition (rev.)* definition for impairment: "The loss of, loss of use of, or derangement of any body part, system, or function." Given this definition, one may assume any patient who has undergone an invasive procedure that has permanently changed any body part has suffered a derangement. Therefore, the patient should be evaluated for an impairment by a Level II Accredited Physician. Although the rating provided may be zero percent, it is essential that the physician perform the necessary tests, as outlined in the *AMA Guides, 3rd Edition (rev.)* for the condition treated, in order to justify the zero percent rating.

11. As found, Claimant has failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Scott that he warranted a 0% whole person permanent impairment as a result of his December 8, 2020 admitted industrial injury. Dr. Scott's DIME opinion is well-reasoned, based on a review of the records and an analysis of Claimant's symptoms, and relies on the proper portions of the *AMA Guides*. Dr. Scott correctly determined that Claimant has no diminution of upper urinary tract function and therefore does not qualify for a rating under the first portion of Section 11.1, Table 1, Class 1. He also noted Claimant has no symptoms of upper urinary tract dysfunction and does not qualify for a rating under the second portion of Section 11.1, Table 1, Class 1.

12. As found, Dr. Scott's statement that Claimant "has a Class 1 impairment of the whole person of 0% person, i.e., he has no diminution of upper urinary tract function or symptoms and signs of upper urinary tract dysfunction with no requirement of continuous treatment or surveillance," is not a misstatement of fact. The statement is part of Dr. Scott's rationale for his impairment rating and is reasonably construed as reflecting that Claimant has no impairment under Section 11.1, Table 1, Class 1. Dr. Scott was merely quoting the relevant portion of the *AMA Guides* under which Claimant has no impairment. Furthermore, Dr. Scott's impairment rating is mirrored in rationale by the impairment rating of the ATP Dr. Koval. She noted that Claimant's renal function is nominal, and he does not meet criteria for the lowest class of impairment.

13. As found, Dr. Scott's DIME opinion is not required to contain an analysis of every conceivable way Claimant could receive an impairment rating through a physician's exercise of discretion. His failure to address impairment under the provision that provides impairment for total loss of a kidney does not constitute error. He found Claimant had only a portion of his kidney removed. Under the plain language of the *AMA Guides* the removal of a portion of a kidney does not qualify for impairment. The section requires the total removal of a kidney. Dr. Scott therefore reasonably elected not to discuss why he did not exercise discretion to find impairment under an inapplicable portion of the *AMA Guides*.

14. As found, in contrast to Dr. Scott's DIME opinion, Dr. Mayer determined that Claimant sustained a 4% whole person impairment as a result of the nephrectomy. She

specifically determined that her impairment rating consisted of a 2% whole person impairment for partial removal of the kidney along with a 2% discretionary impairment due to the presence of cancer in the kidney under Section 11.1, Table 1, Class 1 (page 201) of the *AMA Guides*. Dr. Mayer concluded that, by combining the 2% rating from the sub-note to Table 1 and the 2% rating from Section 11.1, Table 1, Class 1 Claimant suffered a 4% whole person impairment as a result of his December 8, 2020 admitted industrial injury and subsequent surgery. She reasoned that DIME Dr. Scott failed to properly apply the *AMA Guides*. Dr. Scott specifically did not consider Claimant's structural loss from his surgery for renal cancer and his required ongoing surveillance of his cancer by an oncologist. He also failed to take into account the loss Claimant sustained to his kidney structure that gave rise to required maintenance care due to safety concerns about the loss of a portion of the kidney.

15. As found, like Dr. Scott, Dr. Mayer also recognized that Claimant's renal function remains normal and he had no loss of function from the surgery. Signs, in the absence of symptoms, are inadequate to warrant an impairment rating under Section 11.1, Table 1, Class 1. Dr. Mayer also agreed that Claimant had no symptoms, but only signs, of upper urinary tract dysfunction. However, in the absence of both signs and symptoms of upper urinary tract dysfunction, a rating under Table 1, Class 1 cannot be applied. Furthermore, Dr. Mayer incorrectly applied Table 1, Class 1 by testifying that a rating should be provided for periodic monitoring (as opposed to continuous monitoring), while Table 1, Class 1 actually reads that impairment "does not require continuous treatment or surveillance." Monitoring only becomes a factor in assigning a rating if the injured worker's impairment falls under Section 11.1, Table 1, Class 2 or higher.

16. As found, despite Dr. Mayer's opinion awarding a 2% whole person impairment for loss of a portion of the kidney, the *AMA Guides* note that an additional 10% whole person impairment is only for the "solitary kidney" i.e., total loss of a kidney. There is no mention in the *AMA Guides* of proportional impairment for partial loss of a kidney. The *AMA Guides* specify a detailed basis for impairment ratings, and frequently provide for impairments based on partial losses of body parts or function. However, where there is no discussion of proportionate impairment for partial losses, it is reasonable to read the *AMA Guides* as suggesting no impairment. The preceding interpretation is supported by the examples in Chapter 11 page 200. The examples show that in cases where there is partial loss of a kidney (Ex. 2 "marked diminution in size of one kidney" and Ex. 1 "contracted kidneys"), the corresponding impairment ratings lack a component for a proportionate amount of the 10% impairment for total loss of a kidney.

17. As found, finally, although Dr. Mayer relied on the discretion given to rating physicians to use the *AMA Guides* as a starting point for a final impairment rating, Drs. Scott and Koval also had the same discretion and declined to find impairment. Drs. Scott and Koval chose not to rate Claimant for a partial loss of the kidney without concurrent loss of renal function. Dr. Mayer's opinion to the contrary thus merely represents a difference of professional opinion and does not constitute clear and convincing evidence to overcome Dr. Scott's DIME opinion.

18. As found, Claimant has failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Scott. Claimant has offered the opinion of Dr. Mayer with a different rationale for impairment. Dr. Mayer's reasoning represents an alternate application of the *AMA Guides* that is distinct from Dr. Scott's DIME opinion. To the extent Dr. Mayer's opinion is a plausible exercise of discretion by a rating physician, it constitutes a mere difference of opinion and does not reflect clear error on the part of Dr. Scott. The record reveals that Dr. Scott correctly determined that Claimant warranted a 0% whole person impairment rating. Accordingly, Claimant has failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Scott's determination that Claimant suffered a 0% permanent impairment as a result of his December 8, 2020 admitted industrial injury and subsequent surgery is incorrect.

ORDER

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

1. Claimant suffered a 0% whole person permanent impairment as a result of his December 8, 2020 admitted industrial injury and subsequent surgery.

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

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

DATED: September 26, 2022.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-085-135-002

ISSUE

1. Did Claimant establish by a preponderance of the evidence that the right wrist MRI requested by her authorized treating physician (ATP) is reasonable, necessary and related to her May 2, 2017 industrial injury?

FINDINGS OF FACT

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

1. Claimant is a 32 year-old right-handed female. On May 2, 2017, Claimant sustained an acute injury to the triangular fibrocartilage (TCFF) on the ulnar side of her right wrist in the course and scope of her employment.

2. On June 1, 2017, Claimant underwent a right wrist MRI. The report was read as showing severe extensor carpi ulnaris tendinopathy and tendinitis. The most significant pathology appeared at the ulna styloid going distally. (Ex. D, p. 19).

3. Claimant underwent a second right wrist MRI on September 29, 2017. The MRI was read as showing mild extensor carpi ulnaris tendinitis without tearing. (Ex. F, p. 114).

4. On December 6, 2017, John Safanda, M.D. performed a right wrist arthroscopy with debridement and partial excision of the TCFF. The indications for surgery included persistent and debilitating dorsal ulnar right wrist pain. (Ex. B, p. 8). Claimant initially did well postoperatively, but over the next couple of months she experienced a flare-up of pain with ongoing tenderness to palpation at the dorsal aspect of the distal ulna of the right wrist. (Ex. C, p. 11).

5. On September 21, 2018, Dr. Safanda opined that Claimant did not appear to be improving. He expressed reservations about additional surgery given her poor response to surgery. But at Claimant's request, Dr. Safanda referred her for a second opinion with a hand specialist. (Ex. C, p. 12).

6. Claimant began treating with Kai Mazur, M.D. in Santa Rosa, California where she lives. Dr. Mazur examined Claimant on October 3, 2019.[1] At that appointment, Claimant stated the popping and catching sensation in her wrist resolved following the December 6, 2017 surgery, but her dorsal wrist and hand pain persisted and slowly worsened. She described pain along the dorsal ulnar hand that worsened with activities requiring moving

[1] There is no evidence in the record regarding Claimant's treatment, if any, between September 21, 2018 and October 3, 2019.

the wrist. Dr. Mazur ordered another MRI to evaluate the extensor carpi ulnaris. (Ex. D, pp. 16-20).

7. Claimant had a third, right wrist MRI on November 26, 2019. The MRI was read as showing moderate extensor carpi ulnaris tendinosis without a focal tear. (Ex. F, p. 116).

8. Claimant continued to complain of pain in her right wrist. The pain over her dorsal wrist and hand persisted and worsened. The pain ran along the dorsal ulnar hand, and worsened with activities. (Ex. D, pp. 22-37).

9. On June 8, 2020, Dr. Mazur performed a right wrist arthroscopy with TFCC debridement and a right open extensor carpi ulnaris reconstruction. (Ex. D, pp. 38-39).

10. By October 13, 2020, Claimant reported her ulnar-sided pain was subsiding, but she was developing progressive radial wrist pain. Dr. Mazur diagnosed de Quervain's tenosynovitis, and noted that this pain was present previously, but it had worsened. (Ex. D, p. 48).

11. Dr. Mazur performed a right de Quervain's release on March 29, 2021, and Claimant did well following the surgery. (Ex. D, pp. 69-70).

12. On September 30, 2021, Dr. Mazur saw Claimant for a follow-up visit. Claimant complained of numbness surrounding the scar and radial wrist, which was present prior to surgery and had not resolved. Claimant indicated that wearing a watch was uncomfortable because of the pressure it applied to her wrist. On examination, Claimant's Finkelstein test was negative. Dr. Mazur noted Claimant had pain with wrist dorsiflexion and that the volar radiocarpal wrist joint was tender to palpation and there was pain with forced volar flexion. He suspected she had a small ganglion cyst that was not palpable nor visible, but caused pain with certain movement. (Ex. D, pp 79-81).

13. Dr. Mazur noted that Claimant's last MRI on November 26, 2019, nearly two years prior, did not show a ganglion cyst. Because Claimant's symptoms had persisted and slowly worsened, Dr. Mazur was concerned. He felt "[a] repeat MRI scan would be appropriate to rule out a ganglion cyst and guide further treatment." (Ex. D, pp. 80-81).

14. Dr. Mazur submitted a request for authorization on October 5, 2021. (Ex. D, p. 83). On October 7, 2021, Respondents denied Dr. Mazur's request for authorization for a repeat MRI because they deemed the request "incomplete." (Ex. 2, pp 31-32).

15. Claimant saw Dr. Mazur's physician assistant, Jennifer Henshaw-Lefever, two months later, on December 2, 2021. Claimant told Ms. Henshaw-Lefever that the request for the MRI had been denied, but the office did not have any documentation of this. According to the medical records, Claimant was still experiencing pain and it was localized to her radial wrist. Claimant reported swelling and a lump in the area she did not feel before. Claimant recently had foot surgery, and, at times, had to use crutches rather than her knee scooter, which increased her wrist pain. (Ex. D, p. 84).

16. On January 19, 2022, Claimant was treated by Dr. Mazur. He noted that her ulnar-sided pain had resolved, but the radial wrist pain had persisted and was not improving, despite a recent injection. Dr. Mazur diagnosed an occult ganglion cyst or possible flexor carpi radialis tendinosis, specifically noting that neither could be felt or seen. Dr. Mazur noted Claimant's symptoms had worsened and were "related to more weightbearing on the wrist while recovering from foot surgery". Dr. Mazur further noted, repetitive activities and forceful activities may force further fluid into the ganglion cyst which enlarges the cyst. (Ex. D., pp. 93-95).

17. Dr. Mazur submitted a follow up request for authorization for an MRI on January 14, 2022. (Ex. D, p. 101). On January 18, 2022, Respondents again denied the request for authorization on the basis it was deemed "incomplete." (Ex. 2, pp. 33-34).

18. Respondents retained John McBride, M.D., through Integrated Medical Evaluations, Inc. to review the records and provide an opinion. Dr. McBride completed a records review and issued his report on February 19, 2022. (Ex. H). Dr. McBride did not exam Claimant, nor did he speak with Dr. Mazur.

19. Dr. McBride opined that an MRI is a very sensitive test to detect a ganglion cyst, and none was identified on Claimant's May 29, 2019 MRI. He also noted that Claimant underwent foot surgery requiring her to use crutches, and she developed a new onset of volar radial wrist pain. He "agree[d] with Dr. Mazur that her new radial sided pain is more due to her weightbearing on her crutches while recovering from foot surgery." (Ex. H, p. 130).

20. Dr. McBride testified that the treatment of Claimant's work-related ulnar sided wrist pain has been completed, and Claimant's ulnar-sided wrist injury bears no relationship to, and did not cause, Claimant's current symptoms of radial volar wrist pain. Dr. McBride testified that, while the requested MRI is reasonable, the need for it is not related to the May 2, 2017, work injury.

21. The ALJ finds Dr. McBride's opinion credible, but not persuasive. As early as October 13, 2020, Claimant was developing progressive radial wrist pain. On January 19, 2022, Dr. Mazur noted the Claimant's radial pain had persisted. Dr. Mazur requested authorization for an MRI to rule out a ganglion cyst and to "guide further treatment" because of Claimant's continued pain. While Claimant's use of crutches in late 2021 worsened her pain, the ALJ finds that Claimant's radial sided wrist pain occurred prior to her use of crutches.

22. The ALJ finds Dr. Mazur's opinion regarding the need for an MRI credible and more persuasive. The ALJ finds that the repeat right wrist MRI, requested by Dr. Mazur, will help determine if Claimant's ongoing pain and numbness is related to this injury and her many surgeries, or some cause not related to the admitted claim. The MRI will be beneficial in setting the course of additional treatment, if any, for Claimant.

23. Based on the totality of the evidence, the ALJ finds that Claimant proved, by a preponderance of the evidence, that the repeat right wrist MRI is reasonable, necessary and related.

CONCLUSIONS OF LAW

Generally

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

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

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

A claimant is entitled to medical benefits that are reasonably necessary to cure or relieve the effects of the industrial injury. *See* § 8-42-101(1), C.R.S. 2003; *Snyder v. ICAO*, 942 P.2d 1337 (Colo. App. 1997). The question of whether the need for treatment is causally related to an industrial injury is one of fact. *Walmart Stores, Inc. v. Indus. Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). Similarly, the question of whether

medical treatment is reasonable and necessary to cure or relieve the effects of an industrial injury is one of fact. *Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colo., Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003).

As found, Claimant complained of radial wrist pain as early as October 10, 2020. The right-wrist MRI will assist Claimant's ATP, Dr. Mazur, to determine if Claimant's ongoing pain is related to the admitted claim. The ALJ places greater weight on the ATP's request and explanation for the need for this diagnostic procedure than on the opinion of Dr. McBride. The MRI will be beneficial in setting the course of additional treatment, if any. As found, the right wrist MRI is reasonable, necessary and related.

ORDER

It is therefore ordered that:

1. Respondents shall provide the right wrist MRI for Claimant requested by the Dr. Mazur.

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

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

DATED: September 26, 2022

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

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that the repair of Claimant's right lateral epicondylitis requested by authorized treating provider ("ATP") Jason Rovak, M.D., is reasonable, necessary, and causally related treatment for Claimant's industrial injury.

II. Whether the Claimant proved by a preponderance of the evidence that the right shoulder arthroscopic extensive glenohumeral joint debridement, subacromial decompression, arthroscopic versus mini open rotator cuff repair, and possible long head bicep subpectoral tenodesis, requested by ATP Rudy Kovachevich, M.D., is reasonable, necessary and causally related treatment to Claimant's industrial injury.

STIPULATIONS

The parties stipulated at hearing that the radial tunnel surgery requested by Dr. Rovak is authorized and is reasonable, necessary and related to Claimant's work injury.

FINDINGS OF FACT

1. Claimant is a right-hand-dominant 55-year-old male who has worked for three years as a cement truck driver.

2. Claimant sustained an admitted industrial injury on May 19, 2021 when he was struck by the chute of a cement truck on the inside of his right forearm. Claimant testified that, upon being struck in the forearm, his arm was pushed down and backwards.

3. Claimant presented to Denver Health on May 24, 2021 with complaints of right forearm pain, bruising and swelling. Claimant reported that he was hit in his right forearm, causing his arm to push backwards. Claimant reported pain in the radial aspect of his wrist radiating up to his lateral forearm, lateral epicondyle and up to the biceps. Claimant further complained of numbness and tingling in his right hand and fingers. On examination, Lileya Sobechko, M.D. noted bruising and swelling over the anterior aspect of the forearm; swelling and bulging over the brachioradialis muscle; swelling, bulging and bruising over the distal bicep; and limited range of motion of the right elbow, forearm and right upper arm. Claimant was assessed with a right forearm contusion and right arm/forearm strain. Dr. Sobechko provided Claimant a sling and ordered an MRI for possible DBT rupture. She removed Claimant from work.

4. Claimant underwent an MRI of the right elbow on May 26, 2021 which revealed chronic appearing common extensor tendinosis with a moderate, high-grade, partial

thickness interstitial subacute tear with adjacent partial chronic tearing and scarring over the an 11 mm length; and adjacent partial chronic tearing and scarring involving the undersurface of the lateral ulnar collateral more than radial collateral ligaments.

5. Claimant underwent physical therapy and acupuncture treatment with no significant improvement. Claimant was subsequently referred to Jason Rovak, M.D. for an orthopedic evaluation.

6. Claimant first presented to Dr. Rovak on July 1, 2021. Claimant reported that his entire right extremity was pulled back during the work incident on May 19, 2021. Claimant described some burning discomfort on the posterior aspect of the forearm and occasional tingling in the fingers and some discomfort around the insertion of the deltoid. Dr. Rovak reviewed Claimant's occupational medical records and noted that an MRI showed biceps tendinosis without a tear, common extensor tendinosis as well as high-grade partial thickness tearing. Dr. Rovak concluded that, based on the contact site, Claimant certainly could have a bit of contusion around the radial tunnel. He remarked that epicondylitis or radial tunnel was "obviously" within the differential diagnosis given the MRI findings and site of contusion. (Cl. Ex. 7, p. 80). Dr. Rovak assessed with right arm pain and referred Claimant for a nerve conduction study.

7. On August 13, 2021, Claimant presented to Samuel L. Chan, M.D. for a consultation and EMG/nerve conduction study. Claimant reported diffuse pain over the extensor aspect of his right arm and numbness and tingling radiating into his 3rd and 4th digits on the dorsal aspect of his right upper extremity. Dr. Chan noted a normal examination of the bilateral shoulders. The EMG of the right upper extremity was normal. Dr. Chan opined that Claimant's clinical findings were most consistent with radial neuritis and a forearm contusion.

8. On September 8, 2021, Claimant saw Elizabeth Etsy, M.D. at Denver Health. On examination of the right shoulder, Dr. Etsy noted noted tenderness to palpation over distal right deltoid with pain with range of motion over the lateral deltoid. Dr. Etsy noted there was no evidence of rotator cuff dysfunction.

9. Claimant returned to Dr. Rovak on September 23, 2021. Claimant reported experiencing a burning discomfort from about the mid humerus level near the insertion of the deltoid down to the fingers. Dr. Rovak noted that Claimant's EMG was normal and that Claimant's MRI revealed biceps tendinosis as well as lateral epicondylitis findings. He opined that the site of pain reported on his examination was consistent with radial tunnel syndrome, which he noted "can go hand-in-hand with lateral epicondylitis, though it is not terribly common." (Cl. Ex. 7, p. 82). Dr. Rovak administered a steroid injection into Claimant's the radial tunnel for diagnostic and therapeutic purposes.

10. On October 7, 2021 Claimant saw Cynthia Kuehn, M.D. at Denver Health Claimant with complaints of sharp pain near his right shoulder.

11. On October 20, 2021, Dr. Etsy again examined Claimant's right shoulder and noted tenderness over the deltoid, painful range of motion, and diminished motor strength in the biceps and rotator cuff. Regarding Claimant's continued symptoms, Dr. Esty noted, "Consider contribution of initial R shoulder injury to the pt's current presentation. Will MRI shoulder to assess for rotator cuff pathology, given pt's pain and limited AROM on shoulder exam." (R. Ex. P, p. 77).

12. At a follow-up evaluation with Dr. Rovak on October 21, 2021, Claimant reported that the steroid injection helped. Dr. Rovak administered a second steroid injection to the radial tunnel, which did not provide any long-term benefits.

13. Claimant underwent an MRI of the right shoulder on October 22, 2021 which revealed: (1) intermediate and near full-thickness tearing of the supraspinatus; (2) mild tendinosis of the infraspinatus, supscapularis, and long head of the biceps; and (3) moderate acromioclavicular degenerative joint disease.

14. On November 11, 2021 Dr. Chan noted examination of Claimant's bilateral shoulders was normal.

15. On November 18, 2021 Dr. Rovak reviewed Claimant's shoulder MRI and referred Claimant to Rudy Kovachevich, M.D. for a shoulder evaluation.

16. Claimant presented to Dr. Kovachevich on December 2, 2021. He reported a sudden onset of right shoulder pain occurring 6 months prior and that the symptoms had been moderate and fluctuating and were exacerbated by motion at the shoulder and relieved by restricted activity. Dr. Kovachevich noted,

> …[the chute] came down forcefully and hit his forearm and forced his shoulder back aggressively. He had immediate pain in his forearm and subsequent swelling and bruising as well as pain in the shoulder. He was seen initially and the focus was on the forearm but during some of his therapy, he continued to have significant pain in the shoulder that persisted and would not improve.

(Cl. Ex. 8, p. 93).

17. Claimant reported that his pain was mainly on the anterior lateral aspect of the shoulder. On examination of the right shoulder, Dr. Kovachevich noted that rotator cuff musculature was weak and painful against resistance. He further noted decreased range of motion, moderate pain on provocative maneuvers with Neer and Hawkins impingement signs, moderate cross body adduction testing, minimal tenderness of the AC joint, moderate pain and speeds and O'brien testing, and mild to moderate tenderness over the anterior long head biceps tendon. Dr. Kovachevich noted that he had a lengthy discussion with Claimant over the nature of Claimant's traumatic right shoulder injury and persistent shoulder pain. He noted that Claimant "clinically and radiographically has evidence of a large near full-thickness supraspinatus rotator cuff tear as well as diffuse rotator cuff

tendinopathy, bursitis and long head bicep tendon." (Id.). Dr. Kovachevich concluded that further conservative care would not be beneficial or warranted and recommended that Claimant proceed with surgical invention consisting of arthroscopic extensive glenohumeral joint debridement, subacromial decompression, arthroscopic versus mini open rotator cuff repair, and possible long head biceps subpectoral tenodesis.

18. On December 6, 2021, Dr. Kovachevich submitted a request for authorization of right shoulder surgery, which was denied by Respondents.

19. Claimant returned to Dr. Rovak on December 9, 2021. Dr. Rovak opined that Claimant failed conservative management for the elbow and forearm. He recommended that Claimant undergo a lateral epicondyle debridement and radial tunnel release. Dr. Rovak further recommended that they try to do the surgery at the same time as Claimant's shoulder surgery to avoid multiple operative settings and recoveries.

20. Claimant saw Jennifer Pula, M.D. at Denver Health on December 16, 2021. Dr. Pula noted that Claimant had reported right shoulder pain since his initial injury. On examination of right shoulder, Dr. Pula noted tenderness to palpation on the superior right shoulder, with no tenderness to the AC joint or lateral acromion.

21. On December 23, 2021 Dr. Rovak submitted for authorization of a right lateral epicondyle debridement and radial tunnel release.

22. On December 30, 2021 Jonathan L. Sollender, M.D. performed an Independent Medical Examination ("IME") at the request of Respondents. Dr. Sollender did not offer any opinion on Claimant's right shoulder as it was outside of his specialty. Dr. Sollender opined that Claimant has radial tunnel syndrome. He noted that there were radiographic findings of right lateral epicondylitis but very little clinical evidence in support of lateral epicondylitis. He noted that his examination of Claimant was inconsistent with the MRI findings of right lateral epicondylar pathology. Based on the lack of clinical findings and the chronic appearance of the tissues of the lateral epicondyle on his MRI imaging, Dr. Sollender opined that Claimant's right lateral epicondylitis was present prior to the May 19, 2021 work injury. Dr. Sollender noted that Claimant did not report being struck at the lateral right elbow, but instead was struck over the extensor surface of the right forearm. He opined that the only area of injury from the May 19, 2021 work injury is the right radial tunnel region. Dr. Sollender opined that a right radial tunnel release was a reasonable approach to treat Claimant's condition.

23. Claimant attended a follow-up evaluation with Dr. Chan on January 27, 2022. Dr. Chan noted that Drs. Rovak and Kovachevich recommended surgical intervention. Dr. Chan reviewed Dr. Sollender's IME report, noting Dr. Sollender's determination that Claimant did not have any objective findings of lateral epicondylitis but findings suggesting radial neuropathy. As such, Dr. Chan opined that the radial tunnel release would be considered appropriate. He further opined that it would be reasonable for Claimant to be evaluated by Dr. Kovachevich as well as Dr. Rovak to review Claimant's current symptoms as well as proposed surgical intervention.

24. At the request of Respondents, Mark Failinger, M.D. performed an IME on March 4, 2022 to address Claimant's right shoulder. Claimant reported that his right arm was pushed down and backwards during the work incident and that he experienced immediate pain in his right arm from the shoulder to the fingers. Claimant further reported having ongoing right shoulder pain with physical therapy. Dr. Failinger concluded that it was not medically probable that the reported mechanism of injury created tearing in Claimant's rotator cuff. He explained that, unless the movement was of severe magnitude torqueing the shoulder significantly beyond its normal range of motion, forcing the arm into some extension could not have created a rotator cuff tear. He further noted that there was no specific mention of shoulder pain in Claimant's initial medical visits nor in the physical therapy notes. Dr. Failinger opined that there was not reasonable temporal or timely reporting of shoulder symptoms.

25. Dr. Failinger testified consistent with his IME report at a post-hearing deposition. Dr. Failinger testified as a Level II accredited expert in orthopedic surgery and sports medicine. Dr. Failinger stated that there was a brief mention of shoulder symptoms in a physical therapy report from June 2021, but no mention of any significant shoulder symptoms or dysfunction until around October 7, 2021. He testified that it is highly improbable Claimant injured his shoulder on May 19, 2021 when there was no mention of the shoulder being the source of Claimant's pain until October 2021. Dr. Failinger explained that Claimant's right arm would have had to be severely pushed back to cause a rotator cuff tear, with force pushing the arm out behind and almost perpendicular to the body. He further testified that if Claimant did sustain a tear in his shoulder on May 19, 2021, there likely would have been high levels of shoulder pain complaints at that time. Dr. Failinger opined that Claimant has some preexisting degenerative tearing in his shoulder.

26. Claimant credibly testified at hearing that he had no limitations or symptoms in his right forearm or right shoulder prior to his admitted industrial injury of May 19, 2021. No evidence was offered indicating Claimant had prior symptoms or limitations or received prior treatment to the right forearm or shoulder. Claimant testified that, prior to the work injury, he had never been advised by any physician that he had a rotator cuff tear. He stated that he felt pressure at his right shoulder when the chute pushed his arm back and down. He testified that on the date of the work injury his forearm was in severe pain. Claimant further testified that he had some pain up through his arm into the shoulder and upon removing the sling he and participating in physical therapy he experienced continued right shoulder pain. Claimant testified that he continues to have burning numbness down from his elbow into his hand and into his middle and index ring fingers.

27. The ALJ finds the opinions of Drs. Rovak, Kovachevich and Etsy, as supported by Claimant's credible testimony and the medical records, more credible and persuasive than the opinions and testimony of Drs. Sollender and Failinger.

28. Claimant proved it is more probable than not the lateral epicondyle and right shoulder surgeries recommended by Drs. Rovak and Kovachevich are causally related to the work injury and reasonably necessary to cure and relieve its effects.

CONCLUSIONS OF LAW

Generally

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

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

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

Medical Treatment

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

Claimant proved it is more probable than not the right lateral epicondyle debridement recommended by Dr. Rovak is reasonable, necessary and causally related to Claimant's work injury. Both Dr. Rovak and RIME physician Dr. Sollender opine that there is radiological evidence of lateral epicondylitis; however, Dr. Sollender concluded that the condition was pre-existing, asymptomatic and was not aggravated, accelerated or exacerbated by the work injury. Claimant credibly testified, and there is no evidence to the contrary, that he did not have any symptoms or limitations in his right forearm prior to the work injury. Subsequent to the work injury, Claimant has continued to experience symptoms and limitations in his right forearm into his hand. Dr. Rovak, who is familiar with Claimant's mechanism of injury and presentation, explained that lateral epicondylitis can go hand-in-hand with radial tunnel syndrome, and has recommended the surgery to cure and relieve Claimant from the effects of his work injury.

Claimant also proved it is more probable than not that the right shoulder surgery recommended by Dr. Kovachevich is reasonably necessary and causally related to his work injury. Claimant has been consistent in reporting to his physician that his arm was pushed backwards during the work incident. There is objective radiological evidence of a rotator cuff injury. Dr. Failinger opined that the need for shoulder surgery is unrelated to the work injury as the mechanism of injury is unlikely to cause Claimant's shoulder condition, and because there was a delay in documented shoulder symptoms and limitations. As noted by Dr. Kovachevich, he had a lengthy discussion with Claimant regarding the nature of his injury and his shoulder symptoms, and credibly concluded that Claimant requires surgery for his condition. Claimant credibly testified, and there is no evidence to the contrary, that he did not have any right shoulder symptoms or limitations prior to the work injury. There is no evidence Claimant sustained a separate injury after the work injury that resulted in his shoulder condition.

Regarding the delay in documented right shoulder symptoms or limitations in the medical records, the ALJ is persuaded that the treating physicians initially focused on Claimant's right forearm. When Claimant's condition did not improve with conservative treatment, Dr. Etsy then considered the contribution of an initial right shoulder injury to Claimant's symptoms. Upon obtaining an MRI, there was objective evidence of shoulder pathology. The ALJ does not consider Dr. Chan's normal shoulder findings to be dispositive on the issue of relatedness, as he consistently noted normal findings even after the rotator cuff tear was revealed on MRI and Drs. Etsy, Kovachevich and Pula noted abnormal shoulder findings. To the extent the rotator cuff tear is degenerative and preexisting, the ALJ is persuaded that the work injury aggravated, accelerated or exacerbated Claimant's right shoulder condition, causing the need for the recommended right shoulder surgery.

Based on the totality of the evidence, the lateral epicondyle and right shoulder surgeries recommended by Drs. Rovak and Kovachevich are causally related to the work injury and reasonably necessary to cure and relieve its effects.

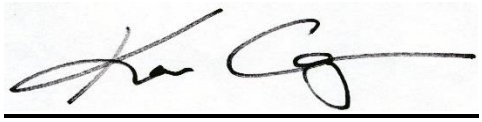
ORDER

1. Claimant proved by a preponderance of the evidence that the right lateral epicondylitis debridement recommended by Dr. Rovak and the right shoulder arthroscopic extensive glenohumeral joint debridement, subacromial decompression, arthroscopic versus mini open rotator cuff repair, and possible long head bicep subpectoral tenodesis requested by Dr. Kovachevich, M.D. are reasonable, necessary and causally related treatment for Claimant's industrial injury. Respondents are liable for the recommended surgeries.

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

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

DATED: September 26, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Whether Respondents are subject to penalties under §8-43-304(1), C.R.S. for failing to obey a February 9, 2022 prehearing order of Prehearing Administrative Law Judge (PALJ) Craig C. Eley.

FINDINGS OF FACT

1. Claimant sustained an admitted industrial injury on March 16, 2021.

2. On November 5, 2021, Claimant submitted a mileage reimbursement request to Respondents for mileage expenses incurred from September 2, 2021 through October 28, 2021. On January 6, 2022, Claimant submitted a mileage reimbursement request to Respondents for mileage expenses incurred from November 3, 2021 through December 12, 2021. The aforementioned mileage expenses total $3,901.46.

3. On November 5, 2021, Respondents submitted a request for reimbursement for a November 3, 2021 prescription in the amount of $17.80.

4. A prehearing conference took place before PALJ Craig C. Eley on February 9, 2022 on Claimant's Motion to Compel Mileage Payment and Prescription Reimbursement. Respondents requested payment for the mileage and prescription expenses detailed in Findings of Fact #2 and #3 herein.

5. PALJ Eley found good cause to grant Claimant's motion. He issued an order dated February 9, 2022 ordering Respondents to, no later than February 16, 2022, deliver to Claimant's attorney checks payable to Claimant for $3,901.46 for mileage expenses and $17.80 for prescription reimbursement.

6. As of the date of hearing in this matter, July 13, 2022, Respondents had not made any payments to Claimant pursuant to PALJ Eley's February 9, 2022 order. Respondents did not call any witnesses nor offer other evidence regarding its reason for failing to issue payment pursuant to PALJ Eley's order.

7. Claimant suffered financial harm and stress as a result of Respondents' failure to pay the reimbursement as ordered. Claimant credibly testified that her only income is $838.88 in workers' compensation benefits every two weeks, which is less than her expenses. Claimant testified her fuel costs are significant due to having to commute to her doctors' appointments for treatment of her work injury. Claimant further testified that she has had to borrow money and rely on her credit cards due to Respondents' failure to reimburse her mileage expenses.

8. Claimant's counsel has made numerous attempts to resolve the outstanding payments with Respondents to no avail.

CONCLUSIONS OF LAW

Generally

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

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

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

Penalties

Section 8-43-304(1), C.R.S. authorizes the imposition of penalties of not more than $1000 per day if an employee or person "fails, neglects, or refuses to obey any lawful order made by the director or panel." This provision applies to orders entered by a PALJ. *See* §8-43-207.5, C.R.S. (order entered by PALJ shall be an order of the director and is binding on the parties); *Kennedy v. Industrial Claim Appeals Office,* 100 P.3d 949 (Colo. App. 2004). A person fails or neglects to obey an order if she leaves

undone that which is mandated by an order. A person refuses to comply with an order if she withholds compliance with an order. *See Dworkin, Chambers & Williams, P.C. v. Provo,* 81 P.3d 1053 (Colo. 2003). In cases where a party fails, neglects or refuses to obey an order to take some action, penalties may be imposed under §8-43-304(1), even if the Act imposes a specific violation for the underlying conduct. *Holliday v. Bestop, Inc.,* 23 P.3d 700 (Colo. 2001).

Whether statutory penalties may be imposed under §8-43-304(1) C.R.S. involves a two-step analysis. The ALJ must first determine whether the insurer's conduct constitutes a violation of the Act, a rule or an order. Second, the ALJ must determine whether any action or inaction constituting the violation was objectively unreasonable. The reasonableness of the insurer's action depends on whether it was based on a rational argument in law or fact. *Jiminez v. Industrial Claim Appeals Office,* 107 P.3d 965 (Colo. App. 2003); *Gustafson v. Ampex Corp.,* WC 4-187-261 (ICAO, Aug. 2, 2006). There is no requirement that the insurer know that its actions were unreasonable. *Pueblo School District No. 70 v. Toth,* 924 P.2d 1094 (Colo. App. 1996).

The question of whether the insurer's conduct was objectively unreasonable presents a question of fact for the ALJ. *Pioneers Hospital v. Industrial Claim Appeals Office,* 114 P.3d 97 (Colo. App. 2005); *see Pant Connection Plus v. Industrial Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010). A party establishes a prima facie showing of unreasonable conduct by proving that an insurer violated a rule of procedure. *See Pioneers Hospital* 114 P.2d at 99. If the claimant makes a prima facie showing the burden of persuasion shifts to the respondents to prove their conduct was reasonable under the circumstances. *Id.*

Per PALJ Eley's February 9, 2022 order, Respondents were required to pay Claimant a total of $3,919.26 no later than February 16, 2022. As of the date of hearing, Respondents had not paid Claimant pursuant to PALJ Eley's order. Respondents' failure to pay Claimant pursuant to PALJ Eley's February 9, 2022 order constitutes a failure to obey a lawful order.

Respondents' conduct was objectively unreasonable. Respondents provided no explanation for their failure to comply with PALJ Eley's order. There is no evidence Respondents were unaware of the order or attempted to comply. Respondents do not dispute that they owe Claimant the reimbursement ordered by PALJ Eley. Claimant's counsel has made numerous attempts to resolve the outstanding payments with Respondents to no avail. A reasonable insurer who received an order from an ALJ to reimburse Claimant for mileage and benefits by a certain date would comply. Respondents failure to do so was objectively unreasonable. Accordingly, the imposition of penalties is appropriate.

Respondents offered no evidence regarding their ability to pay a fine. As such, there is no evidence indicating Respondents are unable to pay a penalty that is proportionate to their offense. Based on the degree of reprehensibility of Respondents' conduct, the harm suffered by Claimant, penalties assessed in comparable cases, and Respondents' ability to pay, the ALJ concludes that a penalty of $100.00/day is

proportionate to the offense and appropriate. A penalty of $100.00 for the period of 146 days (February 17, 2022 to July 13, 2022, the date of hearing) totals $14,600.00.

The penalty of $100.00/day shall continue until Respondents issue the outstanding payment to Claimant for $3,901.46 in mileage reimbursement and $17.80 in prescription reimbursement.

ORDER

It is therefore ordered that:

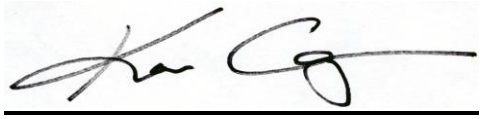
1. Respondents shall pay penalties at the rate of $100.00 per day from February 17, 2022 to July 13, 2022, in the aggregate amount of $14,600.00, and continuing thereafter at the same rate until Respondents issue payment to Claimant for $3,901.46 for mileage reimbursement and $17.80 for prescription reimbursement. 75% of the fine shall be apportioned to Claimant and 25% of the fine shall be apportioned to the Subsequent Injury Fund.

2. Respondent shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due, pursuant to §8-43-410, C.R.S.

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

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

DATED: September 27, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

- Did Claimant prove he suffered a compensable injury on March 14, 2021?
- Respondents stipulated that the incident on July 28, 2021 was compensable, but dispute that nature or extent of the medical treatment related to the incident.
- Did Claimant prove a left total hip arthroplasty performed on June 1, 2021 by Dr. Schuck was causally related to the admitted work accident and/or the disputed claim?

STIPULATIONS

- The parties stipulated to an average weekly wage of $1,772.78 which included concurrent employment.
- The July 28, 2021 industrial injury is compensable.
- If the total hip replacement is found to be related to the industrial injury the Claimant is entitled to three weeks of temporary total disability benefits beginning on June 1, 2022 or credit for sick time or leave taken.

FINDINGS OF FACT

1. Claimant works for Employer as a fire engineer and arson investigator for the Pueblo Fire Department. The job is physically demanding, requiring heavy lifting of between 50 to 100 pounds, hauling hoses, and climbing on to the top of his fire truck to operate the flow of water from the pump control panel.

2. In addition to his job for the City, Claimant is a wildland firefighter. Every year, the physical requirements for that position is taking a "pack test". He was able to perform his annual pack test in February 2021. This test consists of wearing a 45 pound vest and walking 3 miles which he did in 40 ½ minutes, which was under the time limit of 42 minutes. Following this test, he had no pain in his left hip.

3. On March 14, 2021, following a fire at a residence, Claimant was assisting other fire department and law enforcement personnel in removing bodies from the basement of the residence through a narrow basement window. Claimant was at the bottom of the backboard with Claimant bearing most of the weight of one of the bodies. While removing the body on the backboard, Claimant he felt a pop like a rubber band midline on his left thigh. It felt like he pulled a muscle.

4. Claimant reported the injury on the same day and a First Report of Injury was filled out by Employer on March 17, 2021 (Claimant Exhibit 4, page 9).

5. Claimant did not seek medical treatment and continued working full duty. Claimant did not have pain in his hip joint. His pain was mostly in his thigh and groin. Prior to July 28, 2021, his pain did not completely resolve but he was able to function.

6. On July 28, 2021 the Claimant was performing his job as a fire engineer and was called to an alarm for smoke behind the steel mill in Pueblo. When he arrived he realized that a U-Haul truck was on fire. He was operating the panel on top of the fire truck that controlled the water flow while another firefighter was spraying the water from a hose attached to the fire truck. When he stepped down from the top of the truck, he stepped on to a large piece of steel angle iron on the ground. As he was stepping on to the angle iron, he did a pseudo-split and he fell backwards on the dirt and grass. He had tremendous pain in his left hip in the joint. He did not report the injury until he returned to the fire station. He sought medical treatment with Concentra the next morning.

7. He reported to Nurse Practitioner Brendon Madrid that he slipped off the side of the truck and felt a pop in his left hip. He also stated that he re-aggravated his prior March 14, 2021 injury. He also noted that he had clicking in his left hip joint. He had 6 or seven physical therapy appointments before it was decided to have an MRI performed.

8. The MRI performed on August 15, 2021 showed moderate to severe osteoarthritis with labral tearing, iliopsoas bursitis with reactive edema of the of the iliopsoas and abductor musculature, mild left hamstring tendinosis and moderate degenerative joint disease of the left hip with labral tearing.

9. Claimant was referred to Dr. Schuck by Concentra for an orthopedic consultation. Claimant was initially seen by Dr. Schuck's physician's assistant, Mitchell Dawson on August 31, 2021. Mr. Dawson performed an intra-articular corticosteroid injection into his hip at the time of the visit.

10. Claimant was next seen by Dr. Ellis, Dr. Schuck's associate on October 5, 2021. Dr. Ellis reported that following the injection, Claimant had a week's worth of relief. Following that, he returned to his baseline level of pain. On October 5, 2021, Dr. Ellis recommended a total hip replacement since conservative care had failed to resolve his pain.

11. Request for authorization of the left hip replacement was denied.

12. A left total hip arthroplasty was performed by Dr. Schuck on June 1, 2022. (Claimant's Exhibit 10).

13. Claimant was referred to Dr. Annu Ramaswamy for an IME at the request of Respondents. Dr. Ramaswamy's IME took place in two parts; the history section on April 4, 2022 and the physical examination section on April 8, 2022.

14. Dr. Ramaswamy's assessment was:

A. Partial or full-thickness left iliopsoas tendon tear – **acute and related to the July 28, 2021 work-related injury.**

B. Left adductor strain – work related-incident (as related to the July 28, 2021 injury.

C. History of pre-existing severe degeneration within the left hip and there appears to be no evidence for a labrum secondary to the degeneration. (Respondents Exhibit A, page 12).

15. Dr. Ramaswamy testified that he evaluated both claims. He felt that the March injury was an upper thigh strain based on the history given. He felt that the July incident was an adductor injury and a partial or full iliopsoas tear. He could not tell if the tear was a full tear or partial tear since the radiologist who he consulted with could not tell due to the amount of fluid present on the MRI. There was also bone edema shown on the MRI. The bone edema could be an acute condition or could be due to the friction of bone on bone.

16. Dr. Rook also performed an IME at the request of Claimant on May 2, 2022. Although he could not be certain as to the diagnosis following the first injury, since there was no examination or medical imaging, he thought the Claimant had a left hip sprain. With respect to the July 28, 2021 incident, the MRI showed an acute injury including fluid in the joint, bone edema in the weight bearing part of the hip joint and bone marrow edema in the head of the femur. Dr. Rook opined that the need for the hip replacement surgery due to the July 28, 2021. He disagreed with Dr. Ramaswamy that the work related injury was limited to the hip flexor muscle.

17. Claimant's testimony was credible and persuasive, including the testimony that he did not have left hip joint pain until July 28, 2021.

18. Claimant proved he suffered a compensable injury on March 14, 2021. The facts with respect to the incident that occurred on that date, namely lifting a body out of a small window when he felt a pop in his thigh are sufficient to establish a compensable injury. Both Dr. Ramaswamy and Dr. Rook concluded that the Claimant suffered a thigh strain from this incident.

19. With respect to the July 28, 2021 incident, Dr. Rook's causation opinions are credible and more persuasive than the contrary opinions offered by Dr. Ramaswamy. Both doctors agree that the hip flexor muscle was injured in the July 28, 2021 incident. What they disagree upon is whether the incident caused permanent aggravation of the Claimant's underlying degenerative left hip arthritis.

20. Claimant proved the right total hip arthroplasty performed by Dr. Schuck was reasonably necessary and causally related to the compensable work injuries. No one disagrees that the left hip arthroplasty was the appropriate procedure to address Claimant's ongoing hip problems. The surgery did in fact alleviate the Claimant's pain in

his hip. The work accidents aggravated, accelerated, or combined with the pre-existing condition to cause the need for the hip replacement.

21. The stipulated average weekly wage corresponds to a maximum TTD rate of $1,158.92.

22. The Claimant was off work beginning June 1, 2022 due to his hip surgery.

CONCLUSIONS OF LAW

A. Compensability

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

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

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

As found, Claimant proved he suffered compensable injuries on March 14, 2021 and July 28, 2021. Claimant's lifting incident on March 14, 2021 caused a temporary strain of his thigh as both Dr. Ramaswamy and Dr. Rook have opined. Further, the fall on July 28, 2021 proximately caused left hip joint symptoms. Despite the fact that he had preexisting osteoarthritis, his condition was asymptomatic, despite his heavy duty work requirements including his ability to perform his annual pack test.

B. Medical benefits

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

The existence of a preexisting condition does not disqualify a claim for medical benefits where an industrial injury aggravates, accelerates, or combines with a preexisting condition to produce the need for treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Pain is a typical symptom from the aggravation of a pre-existing condition. If the pain triggers the need for medical treatment, the claimant is entitled to medical benefits as long as the pain is proximately caused by the employment-related activities and not the pre-existing condition. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Abeyta v. Wal-Mart Stores, Inc*., W.C. No. 4-669-654 (January 28, 2008). However, the mere fact a claimant experiences symptoms at work does not necessarily mean the employment aggravated or accelerated the pre-existing condition. *Finn v. Industrial Commission*, 437 P.2d 542 (Colo. 1968); *Cotts v. Exempla*, W.C. No. 4-606-563 (August 18, 2005). The ALJ must determine if the need for treatment was the proximate result of an industrial aggravation or is merely the direct and natural consequence of the pre-existing condition. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Carlson v. Joslins Dry Goods Company*, W.C. No. 4-177-843 (March 31, 2000). A claimant need not show an injury objectively caused any identifiable structural change to their underlying anatomy to prove an aggravation. A purely symptomatic aggravation is sufficient for an award of medical benefits if it the symptoms were triggered by work activities and caused the claimant to need treatment he would not otherwise have required. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Cambria v. Flatiron Construction*, W.C. No. 5-066-531-002 (May 7, 2019).

The Claimant has proven that left total hip arthroplasty performed by Dr. Schuck was reasonably necessary. The dispute relates to causation. As found, Claimant proved the need for surgery was proximately caused by the work accident. Claimant's testimony regarding the accident, and the onset and progression of hip symptoms is credible. Dr. Rook's causation analysis is credible and more persuasive than the contrary opinions offered by Dr. Ramaswamy. Claimant arrived at work on July 28, 2021 with a degenerated but asymptomatic hip. He then fell and did a pseudo-split and had tremendous amount of pain in the hip joint. By the next day, he noticed clicking in the hip. Although Claimant had pre-existing degenerative changes before the accident, he was not a candidate for a hip replacement because he was asymptomatic. The possibility that Claimant would have developed hip symptoms at some point in the future does not negate the fact it became symptomatic on July 28, 2021 as a direct and proximate consequence of his industrial accident.

ORDER

It is therefore ordered that:

1. Claimant's claim for accidental injuries on March 14, 2021 is compensable. As stipulated, his injuries on July 28, 2021 are compensable.

2. Insurer shall cover medical treatment from authorized providers reasonably needed to cure and relieve the effects of Claimant's compensable injuries, including the right total hip arthroplasty performed by Dr. Schuck on June 1, 2022.

3. Claimant's average weekly wage is $1,772.78, with a corresponding TTD rate of $1,181.85 per week. Since this amount exceeds the cap for the dates of injury his TTD is limited to $1,158.92 for the disability beginning on June 1, 2022.

4. Insurer shall pay Claimant TTD benefits, commencing June 1, 2022 and continuing until terminated according to law, subject to any wage continuation.

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

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

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

DATED: September 27, 2022

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

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that ongoing Botox injections constitute reasonable, necessary, and related medical maintenance benefits designed to relieve the effects of her work-related injury or to prevent further deterioration of her condition pursuant to *Grover v. Industrial Comm'n*, 795 P.2d 705 (Colo. App. 1988).

FINDINGS OF FACT

1. On August 16, 2022, the parties entered into a stipulation which was approved by the ALJ on August 18, 2022. As relevant to the issued to be decided in this Order, the parties stipulated that Claimant's date of maximum medical improvement is August 1, 2022, the date of Claimant's most recent appointment with his authorized treating physician (ATP), Myles Nathaniel Cope, M.D. The remaining stipulations are not material to the issue for decision in the present matter (*i.e*., W.C. 5-091-017-001).

2. Claimant sustained an admitted injury when he was involved in a roll-over motor vehicle accident arising out of the course of his employment with Employer on October 30, 2018. As a result of the accident, Claimant sustained multiple injuries, including a close head injury, C1-C2 fracture, L1 compression fracture, left shoulder injuries, and left wrist injuries. Claimant was initially treated conservatively, and later underwent an occiput to C2 posterior fusion surgery on March 13, 2019. Following surgery, Claimant had continued care and treatment for multiple issues, including headaches. (Because the issue in the present matter relates to authorization for headache treatment, the ALJ does not address Claimant's other injuries or treatment, except as relevant to headaches and the medical benefits requested).

3. On January 24, 2020, Claimant was evaluated by authorized treating physician (ATP) James Rafferty, D.O. Dr. Rafferty indicated Claimant's headaches were fairly constant and variable in intensity since his injury. He indicated Claimant's headaches were thought to be cervicogenic in nature with muscle tension or contraction contributors. He diagnosed Claimant with likely cervicogenic headaches from cervical spine injury, and possible occipital neuralgia. Claimant was evaluated by a neurologist, Dr. Sykes, who placed Claimant on headache medications, which were discontinued due to side effects. (Ex. G).

4. Claimant was evaluated by Jeff Reynek, N.P., for headaches on January 27, 2021.[1] Mr. Reynek diagnosed Claimant with intractable chronic migraine without aura, chronic posttraumatic headache, and cervicogenic headaches. Claimant had tried various

[1] No treatment records from Mr. Reynek were offered or admitted into evidence. The information related to Claimant's treatment and diagnosis by Mr. Reynek is contained in report by other providers, and IME physicians.

headache medications without improvement. Mr. Reynek recommended consideration of Botox injections for headaches. (Ex. S).

5. On April 14, 2021, Claimant saw Dr. Rafferty who noted that his headaches remained symptomatic and were most likely cervicogenic in nature. Claimant was primarily using Tylenol for headaches, as other medications were not effective. Dr. Rafferty noted Claimant was going to wait until completion of treatment for his cervical spine, which included facet joint injections before considering Botox injections. (Ex. G).

6. On June 8, 2021, Claimant underwent a C5-6 cervical medial branch block which provided relief of Claimant's cervical pain after the injection. The admitted records are unclear as to whether the medical branch blocks relieved Claimant's headaches. Based on the results of the medial branch block, on June 9, 2021, one of Claimant's ATPs, Greg Reichhardt, M.D., recommended a radiofrequency nerve rhizotomy. (Ex. E).

7. On July 12, 2021, Claimant underwent Botox injections into the scalp and cervical spine, apparently performed by Mr. Reynek. (Ex. 7, S). Although not documented in any contemporaneous records, Claimant credibly testified that he noticed an approximately 20% improvement in his headaches following the July 12, 2021 Botox injection.

8. Claimant underwent a cervical rhizotomy on July 21, 2021, performed by David Columbus, M.D.[2] On August 12, 2021, Claimant saw Dr. Reichhardt and reported no improvement in his neck pain with the rhizotomy, but did note that his headaches "might have decreased a little bit from a 7 down to a 5-6/10." (Ex. E).

9. Claimant underwent a second set of Botox injections on October 6, 2021. Claimant testified that he improved approximately 10% additional relief when compared to the July 12, 2021 Botox injections. (Ex. 7).

10. On October 21, 2021, Kathy McCranie, M.D., performed a physician advisor review for Respondents related to Claimant's request for additional Botox injections. Dr. McCranie, citing an August 24, 2021 record from Dr. Rafferty indicated Claimant received 31 Botox injections into the scalp and cervical spine with no improvement, and that Claimant had persistent headaches and dizziness.[3] Dr. McCranie also summarized a record from Dr. Columbus dated July 21, 2021, in which Dr. Columbus indicated that the June 8, 2021 medial branch blocks resulted in a complete resolution of Claimant's cervicogenic headaches. (Ex. S).

11. Claimant received a third set of Botox injections on April 6, 2022, and testified that the relief he received was comparable to the relief he experienced following the October 6, 2021 injections. (Ex. 7).

12. On April 7, 2022, Claimant saw Dr. Rafferty. Claimant reported that "since his dizziness did, in fact, become worse recently he has to wonder about whether or not his

[2] No records from Dr. Columbus were offered or admitted into evidence. Information regarding the procedures performed by Dr. Columbus is contained in reports of other providers and IME reports.
[3] Dr. Rafferty's August 24, 2021 record was not offered or admitted into evidence.

first two sets of Botox injections had helped him with his dizziness as well." Claimant reported that he had not yet responded to the April 6, 2022 injections. (Ex. G).

13. Claimant saw Dr. Reichhardt on April 11, 2022, and reported a 15-20% improvement with the April 6, 2022 Botox injection and felt his balance was better for a couple of days. (Ex. E). Claimant reported similar results to Dr. Rafferty on May 5, 2022. (Ex. G).

14. On April 12, 2022, Dr. McCranie performed another physician advisor review, specifically reviewing an apparent appeal from Mr. Reynek regarding continuing Botox injections. Dr. McCranie characterized Mr. Reynek's appeal as indicating Claimant had receive "significant and sustained benefit having at least 7 less headache days per month and over 100 less headache hours per month. He has a history of chronic migraine headaches and pain occurring 15 days per month 4 or more hours per day and did not tolerate or failed to respond to migraine preventive."[4] Dr. McCranie indicated she did not see additional medical records supporting Claimant's response to Botox. She also noted that Claimant did not meet an 80% improvement requirement for continued Botox injections outlined in the Medical Treatment Guidelines, and there was no documentation of improved function in the appeal letter. Dr. McCranie recommended denying the request for Botox injections. (Ex. S).

15. On May 20, 2022, Annu Ramaswamy, M.D., performed a Rule 8 independent medical examination (IME), at Respondents' request, and issued a report dated June 26, 2022. Based on his review of medical records and examination of Claimant, Dr. Ramaswamy opined that Claimant has cervicogenic headaches. He noted the Botox injections Claimant received did not help substantially, and opined that additional Botox injections would not be clinically indicated. (Ex. F).

16. On June 15, 2022, Claimant saw Myles Cope, M.D., at UC Health, and again on July 18, 2022 and August 1, 2022. With the exception of a prescription for self-injectable Aimovig for migraine prevention, Dr. Cope's treatment records do not document evaluation or treatment of headaches. (A WC164 forms completed on July 19, 2022 and August 1, 2022 include "chronic migraine cephalgia" in the work-related diagnosis, but Dr. Cope's records otherwise do not otherwise mention headaches or migraines). (Ex. H). Claimant testified he had tried the Aimovig injection, but it had no effect on his headaches.

17. Dr. Ramaswamy testified at hearing and was admitted as an expert in occupational medicine and internal medicine. He testified that he does not dispute Claimant has experienced and continues to experience significant headaches. At his examination, Claimant reported constant pressure headaches, without nausea or light sensitivity. Dr. Ramaswamy opined that Claimant's headaches do not have the common features of migraine headaches such as being episodic in nature, or accompanied by photophobia or nausea.

[4] Mr. Reynek's appeal letter was not offered or admitted into evidence.

18. Instead, Dr. Ramaswamy testified that the results of Claimant's rhizotomy, and medial branch blocks, strongly suggest Claimant's headaches may be stemming from the cervical facets. He therefore opined that Claimant's headaches are more likely cervicogenic headaches than migraines.

19. Dr. Ramaswamy testified that there is evidence that Botox is no more effective than a placebo for treatment of cervicogenic headaches, and that Botox is not an appropriate treatment for cervicogenic headaches, citing the Medical Treatment Guidelines for treatment of traumatic brain head injury. He agreed that it would not be dangerous for Claimant to undergo additional Botox injections, but there was no indication to do so. He emphasized that medical treatment should be evidence based, and there is not substantial evidence that Botox is an appropriate treatment for cervicogenic headaches. He testified that it is difficult to scientifically explain how Botox injections would have helped with Claimant's dizziness, and that Botox is not a treatment for dizziness.

20. Dr. Ramaswamy testified he believes Claimant's headaches have a component of occipital neuralgia, and would recommend that Claimant undergo bilateral occipital nerve blocks, which have not been performed. He noted that Dr. Rafferty originally included "occipital neuralgia" as a possible diagnosis, but that no further evaluation for occipital neuralgia was performed. He opined that it would reasonable and necessary to evaluate Claimant for occipital neve blocks, and that Claimant could receive 2-3 such blocks per year if he experienced a positive response. Dr. Ramaswamy's testimony and opinions were credible and persuasive.

21. Claimant testified at hearing that he experienced some, but not complete relief from his headaches with Botox injections. Claimant testified that he received some relief of dizziness following Botox injections, and that he continues to experience headaches, dizziness, and balance issues today. He testified, credibly, that he has had continuous headaches since his work-related injuries, and has constant, but not severe dizziness. Claimant continues to experience constant neck pain as well.

CONCLUSIONS OF LAW

Generally

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

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

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

The need for medical treatment may extend beyond the point of MMI where claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Hanna v. Print Expediters Inc.*, 77 P.3d 863, 865 (Colo. App. 2003); *Hobirk v. Colorado Springs School District #11,* W.C. No. 4-835-556-01 (ICAO, Nov. 15, 2012).

In cases where the respondents file a final admission of liability admitting for ongoing medical benefits after MMI they retain the right to challenge the compensability, reasonableness, and necessity of specific treatments. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003); *Oldani v. Hartford Financial Services,* W.C. No. 4-614-319-07, (ICAO, Mar. 9, 2015). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School District No.11*, W.C. No. 3-979-487, (ICAO, Jan. 11, 2012); *Ford v. Regional Transportation District,* W.C. No. 4-309-217 (ICAO, Feb. 12, 2009. The question of whether the claimant has proven that specific treatment is reasonable and necessary to maintain his condition after MMI or relieve ongoing symptoms is one of fact for the ALJ. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

Even where reasonable and necessary, medical maintenance care must be causally related to a claimant's industrial injury. In some cases, liability for treatment may be terminated by virtue of an intervening event. "Where the need for treatment results

from an intervening injury unrelated to the industrial injury, treatment for the subsequent condition is not compensable*." Lancaster v. Arapahoe County Sheriff Dept*., WC. Nos. 4-744-646 and 4-746-515 (ICAO. May 12, 2010) *citing Owens v. Industrial Claim Appeals Office, 49 P.3d 1187 (Colo. App. 2002).* However, "[t]he determination of whether the need for medical treatment is the result of an independent intervening cause is a question of fact for resolution by the ALJ." *In re Vargas*, W.C. No. 4-325-149 (ICAO August 29, 2002), *citing Owens, supra*.

MAINTENANCE MEDICAL BENEFITS

The need for medical treatment may extend beyond the point of MMI where claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988); *Hanna v. Print Expediters Inc.*, 77 P.3d 863, 865 (Colo. App. 2003); *Hobirk v. Colorado Springs School Dist. #11,* W.C. No. 4-835-556-01 (ICAO, Nov. 15, 2012).

In cases where the respondents file a final admission of liability admitting for ongoing medical benefits after MMI they retain the right to challenge the compensability, reasonableness, and necessity of specific treatments. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003); *Oldani v. Hartford Fin. Serv,* W.C. No. 4-614-319-07, (ICAO, Mar. 9, 2015). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School Dist. No.11*, W.C. No. 3-979-487, (ICAO, Jan. 11, 2012); *Ford v. Regional Transp. Dist.,* W.C. No. 4-309-217 (ICAO, Feb. 12, 2009. The question of whether the claimant has proven that specific treatment is reasonable and necessary to maintain his condition after MMI or relieve ongoing symptoms is one of fact for the ALJ. *See Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

Claimant has failed to establish by a preponderance of the evidence that ongoing Botox injections are reasonably necessary to relieve the effects or prevent further deterioration of Claimant's condition. Claimant has experienced significant headaches and moderate dizziness since the October 30, 2018 as the result of his work-related motor vehicle accident.

Claimant was initially diagnosed with cervicogenic headaches, and possible occipital neuralgia. At some point, Claimant was referred to Mr. Reynek, who apparently diagnosed Claimant with migraine headaches. However, Mr. Reynek's records were not offered or admitted into evidence, and the only information related to his examination, diagnosis, and treatment of Claimant is references by other providers and IME physicians. No credible evidence was admitted indicating any other provider independently diagnosed Claimant with migraine headaches. Instead, it appears other providers merely reiterated Mr. Reynek's diagnosis.

No credible, persuasive evidence was admitted indicating that Claimant's headaches are migraine. The record contains no direct evidence of the basis for Mr. Reynek's diagnosis, or how Claimant's response to Botox injections was assessed at or around the time of the injections. For example, Claimant received his first Botox injections

on July 12, 2021, and underwent a cervical rhizotomy and medial branch blocks nine days later, on July 21, 2021. The next relevant treatment documentation in the record following these two procedures is Dr. Reichhart's August 12, 2021 record, in which he indicated Claimant's headaches may have decreased following the rhizotomy, but made no reference to the effect of the Botox injections. The lack of contemporaneous records of either the procedures performed or the Claimant's responses to the Botox injections vs. the cervical spine procedures renders it speculative to determine which procedure actually caused Claimant's headaches to improve. The next admitted medical record from an ATP referencing Botox injections is Dr. Rafferty's February 9, 2022 record (four months after Claimant's second Botox injections) which indicates Claimant received "some but incomplet[e] resolution of his headaches." The evidence is insufficient to determine that Claimant's headaches are migraine in nature.

The ALJ credits Dr. Ramaswamy's testimony and opinions that Claimant's headaches are more likely than not cervicogenic in nature, rather than migraine. Dr. Ramaswamy credibly, and persuasively opined that Botox injections are not an appropriate treatment for cervicogenic headaches. Dr. Ramaswamy's opinions are supported by the Colorado Medical Treatment Guidelines for Traumatic Brain Injury, W.C.R.P. Rule, 17, Exhibit 2, p. 68, which provides Botox injections are "not different from placebo for cervical pain and is not likely to be clinically more effective than placebo for cervicogenic headache." The MTG also provides that Botox injections "are no longer generally recommended for cervicogenic or other headaches" due to evidence of lack of effect.

Dr. Ramaswamy testimony that Claimant's headaches likely have a cervical facet component and that the initial concern about occipital neuralgia was not fully explored was persuasive. Similarly, his testimony that occipital nerve blocks would be a reasonable and necessary procedure for treatment of his headaches, was credible and persuasive, and supports his opinion that Claimant's headaches are not migraine in nature, and that Botox is not an indicated treatment for Claimant's headaches.

ORDER

It is therefore ordered that:

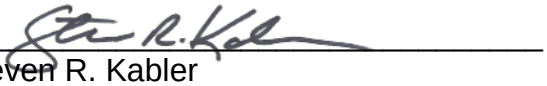
1. Claimant's request for authorization of ongoing Botox injections for as medical maintenance treatment is denied and dismissed.

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

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

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

DATED: September 27, 2022



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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-183-188-001

ISSUE

1. What is Claimant's pre-injury average weekly wage (AWW)?

FINDINGS OF FACT

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

1. Claimant works as a lifeguard for Employer. Claimant was hired on May 18, 2021. (Tr. 9:10-15).

2. On July 1, 2021, Claimant was hit on the head by a large umbrella when the wind knocked it over and she sustained a concussion. (Ex. B).

3. Claimant was treated and placed at Maximum Medical Improvement ("MMI") on May 19, 2022. (Ex. A).

4. Respondents have admitted to medical benefits of $50,513.83 and Temporary Total Disability ("TTD") benefits from July 1, 2021 (the date of injury) through May 18, 2022 (the day before she was placed at MMI). (Ex. A).

5. Claimant testified that Employer hired her at a rate of $17.50 per hour, and she had an expectation of working 40 hours per week. (Tr. 9:19-25).

6. Claimant testified that she worked when her shift required, and the length of her shift varied. Claimant's supervisor determined her shift and when it ended each day. (Tr. 11:22-23:1 and 14:20-15:1).

7. Claimant testified that she was required to clock in an out each day, and her timecard reflected this. (Tr. 12:8-12).

8. Claimant never worked a full 40-hour week. (Ex. C).

9. Prior to being hired, Claimant notified Employer she had a vacation scheduled. She took a week-long vacation shortly after being hired. (Tr. 10:8). This is reflected in Claimant's first paycheck, where she only earned $52.50 for the period between May 10, 2021 and May 23, 2021. (Ex. C).

10. The ALJ finds that the period of time between May 10 and May 23, 2021 is not a reasonable or accurate reflection of Claimant's AWW.

11. Between May 24, 2021 and July 1, 2021, Claimant earned $2,704.66. (Ex. C)

12. There are 39 days between May 24, 2021 and July 1, 2021, which equates to an AWW of $485.45. ($2,704.66 / 39 days = $69.35/day * 7 = $485.45/week).

13. The ALJ finds that $485.45 is a reasonable and fair approximation of Claimant's AWW.

CONCLUSIONS OF LAW

Generally

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

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

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

Average Weekly Wage

Section 8-42-102(2) of the Colorado Revised Statutes, requires the ALJ to base the claimant's AWW on her earnings at the time of injury. But under certain circumstances the

ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993). The ALJ has discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. C.R.S. §8-42-102(3); *Coates*, *Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp*., supra.

As found, Claimant earned $17.50 an hour and she had an *expectation* of working 40 hours per week. Claimant did not have control over her schedule, and at no time between May 24, 2021 and July 1, 2021 did Claimant work a 40-hour week. As found, Claimant's AWW is $485.85, which is a reasonable and fair approximation of her wage loss.

ORDER

It is therefore ordered that:

1. Claimant's AWW is $485.45.

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

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

DATED: September 27, 2022

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

STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-189-623-001

ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that he sustained injuries to his low back arising out of and in the course of his employment as parts manager for Employer on November 2, 2021.

II. If Claimant established that he sustained compensable injuries to his low back, whether he also established that his medical care through UC Health, Dr. Emily Burns and Dr. Kenneth Finn was reasonable, necessary and related to cure and relieve him of the effects of the November 2, 2021 industrial injury.

III. If Claimant established his entitlement to treatment, who is/are the provider(s) authorized to deliver care.

IV. If Claimant established that he suffered compensable work related injuries on November 2, 2021, whether he also established, by a preponderance of the evidence, that he is entitled to Temporary Total Disability ("TTD") benefits beginning November 10, 2022 through the present and ongoing.

V. If Claimant established that he sustained a compensable injury, depending on the date, whether Respondents established, by a preponderance of the evidence, that they are entitled to penalties pursuant to C.R.S. § 8-42-102(1)(a) for Claimant's alleged failure to timely report the injury.

FINDINGS OF FACT

Based upon the evidence presented, including the deposition testimony of Ms. [Redacted, hereinafter M] and Drs. Burns, Brunworth, and Castrejon, the ALJ enters the following findings of fact:

Background

1. Claimant is a 47-year old male who was employed as a parts to service manager by Employer. Among other things, Claimant's duties included stocking oil and various motorcycle parts, delivering those parts to the technicians who needed them and taking inventory. Claimant testified that he was required to lift items that weighed up to seventy pounds at times. Occasionally there were carts and dollies available to move heavier items but, since they were shared by other departments, they were not always available to Claimant.

2. Claimant testified that on November 2, 2021, he was stocking cases of oil when he injured his low back. Apparently, there was no cart/dolly available to Claimant

on this date. Regardless, Claimant explained that he was moving stacked cases of oil forward in the service area so that it would be readily available to the technicians for oil changes. Claimant testified that as he bent down to lift a case of oil from the stack, he felt something "pop/snap" in his back. Claimant testified that he then fell forward striking his left side/flank on the cases of oil.

3. Claimant testified that he had severe bruising on his left side and back toward the spine that lasted for a couple of weeks as a consequence of falling into the cases of oil. Moreover, he testified that following his fall into the stacked cases of oil, he developed progressive tingling in his left leg and toes. Ultimately, the entirety of his left leg went numb and he had difficulty standing upright and walking. He also reported symptoms of saddle aesthesia (sensation loss to the perineum) causing bladder retention and erectile dysfunction. (Resp. Ex. E, p. 20).

4. The incident was unwitnessed.

Claimant's October 27, 2021 Emergency Room Treatment

5. Approximately one week prior to the November 2, 2021 incident, Claimant presented to the Emergency Room (ER) at Grandview Hospital on October 27, 2021 after getting sick and vomiting at work. Upon arrival to the ER, Claimant described a five-day history of coughing, mild shortness of breath, vomiting, diarrhea and headaches. Claimant reported that just prior to his appearance in the ER, he had to vomit and as he was dry heaving, he felt something "exploded" (sic) in his left flank. (Resp. Ex. E, p. 14). Accordingly, he also complained of "flank pain" while in the ER. Per the medical report from this visit, Claimant described his flank pain as "constant, sharp and severe" and made worse by movement, coughing or heaving. *Id.* Claimant had no complaints of anterior abdominal discomfort/tenderness and had no urinary symptoms. *Id*.

6. While in the ER, concern was raised for a possible Covid infection or other viral syndrome and the risk that Claimant may have damaged a lead connected to an implanted spinal stimulator Claimant had placed following a previous injury. CT imaging was ordered which demonstrated the "left back stimulator lead [to be] intact". (Resp. Ex. E, p. 13). Indeed, no abnormality was demonstrated on CT imaging. *Id.* Claimant was assessed with a suspected Covid-19 infection, flank pain and a "strain of [the] lumbar region". He was subsequently discharged from the ER with documentation removing him from work until 11/1/2021. (Resp. Ex. E, p. 12-13, 17).

7. Based upon the evidence presented, the ALJ finds that Claimant's illness and treatment on October 27, 2021 was not in the course and scope of his employment. As such, any healthcare to cure or relieve the effects of what occurred to Claimant on or about October 27, 2021 and any subsequent wage loss caused thereby are not compensable.

Reporting of the November 2, 2021 Injury

8. The evidence presented supports a finding that Claimant had been taught to report all work related injuries to his supervisor. (Depo. Tr. Jackie Mogensen, p. 5). The evidence also supports a finding that Employer posted the Notice regarding the reporting of work-place injuries in four locations around the facility. *Id*. at p. 6, ll. 1-11. Accordingly, the ALJ is convinced that Claimant knew how to report any suspected work-related injury to his supervisor/management.

9. Claimant testified that he notified Doug [Redacted, hereinafter L], his direct supervisor of his November 2, 2021 injury but did not request medical treatment immediately because he believed that the injury was "not that bad" and would resolve quickly. Moreover, because he had missed work the week before with a suspected Covid-19 infection, he did not want to be out of work again for fear of losing his job. Consequently, Claimant testified he went to work, albeit in pain and in a reduced capacity on November 3rd, 4th and 5th.[1] Indeed, Claimant testified that he could not perform the full range of duties associated with his job without help from co-workers related to lifting, carrying and stocking of heavy items.

10. Based upon the evidence presented, including the testimony of Ms. Mogensen and Mr. L[Redacted], the ALJ is persuaded that while Claimant knew how to report on-the-job injuries, he probably failed to inform Mr. L[Redacted] that he developed back pain on November 2, 2021, while stocking cases of oil. Rather, the evidence presented persuades the ALJ that Claimant first reported his alleged November 2, 2021 workplace injury on November 9, 2021, prompting Doug L[Redacted] to complete a "First Notice of Accident Report Form". (Resp. Ex. A, p. 5).

11. The First Notice of Accident Report Form can be interpreted to indicate that Claimant was injured on November 7th or 9th. *Id.* Concerning the mechanism of injury (MOI) referenced on the form, Claimant noted: "I was picking up cases of oil to stock and felt something pop/snap in my back & I couldn't stand up straight". He listed a very similar MOI on the second page of the form. (See Resp. Ex. A, p. 6). Neither statement regarding the alleged MOI contains any reference to falling into the cases of oil. An Employer's First Report of Injury was completed November 16, 2021 and indicates that Employer was notified of Claimant's alleged injury on November 9, 2021 and that "[w]hile picking up cases of oil to stock them, [Claimant] felt a pop/snap in his lower back causing him difficulty in standing up straight". (Resp. Ex. C, p. 10). Similar to the Notice of Accident Form, the First Report of Injury contains no reference to falling into the cases of oil. Moreover, it lists the day of injury as November 7, 2021. (Resp. Ex. C, p. 10).

---

[1] Claimant called into work sick on November 6, 2021. Nonetheless, he did not report to his supervisor that his inability to work was due to an alleged industrial injury that occurred on or about November 2, 2021.

The Testimony of WM[Redacted]

12. Claimant's co-worker, WM[Redacted] testified that he worked in Employer's shipping and receiving area, next to where Claimant worked. Mr. WM[Redacted] testified that after November 2, 2022, he noticed that Claimant appeared to be in pain. According to Mr. WM[Redacted], Claimant was having a hard time moving, walking and lifting heavy items at work. He helped Claimant move oil and parts and suggested that Claimant take it easy at work because he appeared to be in pain. He also recalled an episode where Claimant got sick and threw up at work, hurting his back. He testified that sometime later he observed a very large bruise on Claimant's left side and back extending from just below Claimant's left nipple to and below the belt line; however, could not recall when Claimant showed him this bruising. Nonetheless, when he saw the extent of Claimant's bruising, Mr. WM[Redacted] testified that he immediately notified their supervisor, DL[Redacted] who sent Claimant to Grandview Hospital.

The Initial Treatment for Claimant's Alleged November 2, 2021 Injury

13. Claimant presented to the ER at Grandview Hospital on November 9, 2021 reporting worsening pain in his left leg and foot. (Resp. Ex. E, p. 19). The report from this visit indicates: "About a week ago, his left side was still hurting him while he was at work. [H]e was trying to lift a case of oil. Because of the pain, he says he lifted awkwardly and lost his balance, falling and striking his left flank on a pallet. He did not strike his head or lose consciousness. At the time, he felt a popping sensation in his low back. He does have a history of previous lumbar surgery due to a disc herniation. Review of his chart shows that he had surgery with Dr. Roger Sung in October 2016, a left L3-L4 extrapedicular decompression discectomy. He also has a spinal cord stimulator placed". (Resp. Ex. E, p. 19). Medical documentation supports that the heavy bruising Claimant reported encompassed his left side was visible on this date, suggesting that he had suffered an insult to his flank sometime prior to November 9, 2021. (Resp. Ex. E, p. 27).

14. While in the ER on November 9, 2021, Claimant reported continued pain over the "past week", which was radiating down his left leg and into the foot. (Resp. Ex. E, p. 20). Claimant described a "pins and needle sensation in his left leg and decrease (sic) sensation to light touch. *Id.* He also reported that his left leg felt weak causing him to walk with a limp. *Id.* He reported increased pain with attempts to stand straight, when sneezing or laughing. *Id.* He also reported penile numbness, erectile dysfunction and trouble empting his bladder.[2] CT imaging of the abdomen and pelvis revealed a post void urine residual of 15 mL and a "small muscular injury along the lateral abdominal wall with small hematoma" (findings not present during Claimant's first CT scan of the abdomen and pelvis on October 27, 2021). *Id*. at p. 19; see also Resp. Ex. E, p. 13). Imaging also revealed degenerative disc disease along the lumbar spine,

[2] Claimant testified that he had never had any issues with emptying his bladder or his bowels nor any difficulties obtaining an erection prior to November 2, 2021.

without acute fracture or injury, greatest at "L3-L4 with disc height loss and small anterior osteophyte formation". *Id. (see also,* Resp. Ex. E, p. 25). Physical examination revealed decreased sensation about the left lower extremity and perineum. (Resp. Ex. E, p. 19). Based upon the evidence presented, including the Claimant's medical records and the deposition testimony of Drs. Burns, Brunworth and Castrejon, the ALJ finds that Claimant's reported symptoms and physical examination findings on November 9, 2021 raised concern for possible cauda equine syndrome. (Clmt's. Ex. 1, p. 76). Medical personnel recommended transfer to Memorial Central Hospital for evaluation by CT myelogram by neurosurgery.

15. Because Claimant did not have available childcare on November 9, 2021, he declined the transfer to Memorial Hospital for further evaluation. Instead, he returned to Memorial Central the next morning where he was admitted to the hospital for observation and additional testing. CT myelogram and additional testing[3] was performed. Claimant underwent CT myelogram studies of the cervical, thoracic and lumbar spine, because he was "ineligible" for MRI because of the placement of the aforementioned implanted stimulator in his lower back. An MRI could only be performed if the Claimant's permanent stimulator was physically removed. Upon arrival at the ER, Claimant demonstrated a positive straight leg raise test on the left and 4 out of 5 strength to the left lower extremity. He also complained of decreased sensation to the left groin and lower extremity. (Clmt's Ex. 1, p. 76). Post myelogram imaging (CT) of the lumbar spine demonstrated "no significant lumbar spinal canal stenosis"; however, did reveal "[m]oderate bilateral L3-L4 and L4-L5 foraminal stenosis. (Clmt's Ex. 1, p. 83). Post myelogram imaging of the thoracic spine revealed no thoracic spinal canal or foraminal stenosis. Nonetheless, imaging demonstrated changes to the spinal cord, which could be consistent with spinal dural AV fistula. Consequently, Claimant was referred for a spinal angiogram. (Clmt's Ex. 1, p. 81-82, 96, 100, 125-128). Claimant's angiogram was negative. *Id*. at p. 96. Finally, post myelogram imaging of the cervical spine revealed multilevel foraminal stenosis as multiple spinal segments. (Clmt's Ex. 1, p. 83).

16. As part of his workup on November 10, 2021, Claimant was evaluated by Dr. Janice Miller of the inpatient neurology service for the hospital. Dr. Miller obtained the following history from Claimant on November 12, 2021: "Patient states that a few days before the injury he was ill and had some forceful vomiting and felt like he strained a muscle in his left abdominal region. On the day of the injury he was a work and attempted to pick up a heavy pallet of motor oil and stated that he used slightly different lifting mechanics and immediately felt pain and felt a pop in his lower back". (Clmt's Ex. 1, p. 96). Claimant did not indicate that he had fallen and hit his left flank.

17. Dr. Miller reviewed the results of Claimant's CT myelogram and found "no compressive lesion. (Clmt's Ex. 1, p. 100).

[3] The consult report of attending neurologist Dr. Janice Miller indicates that Claimant also underwent a spinal angiogram to rule out a possible spinal dural AV fistula, which was negative of any vascular anomaly. (Clmt's Ex. 1, p. 95).

18. During his hospital stay, Claimant was also evaluated by physical therapist (PT), Tiffany Woods. Ms. Woods noted that the Claimant was functioning below baseline level of mobility. She recommended use of a walker but also provided the Claimant with education on the use of a cane pending improvement in his symptoms. (Claimant's Ex. 1, p. 106). The Claimant was discharged from the Hospital on November 11, 2021 with recommendations that he follow up with neurology as well as the UC Health Occupational Medicine.

19. Claimant was seen on December 27, 2021, by Physician Assistant (PA) Jayme Eatough under the direction of Dr. Elizabeth Bisgard, MD for evaluation of his back pain. PA Eatough obtained the following history from Claimant: "He was carrying cases of oil from the back hall up to the front. At the time of the injury he had one case in his right hand and went back to pick up another with his left. He did bend over and when he lifted it off the pallet, he felt a pop and immediate pain right away. He dropped everything and could not walk. He reported his injury had occurred when he was carrying cases of oil when he felt a pop and immediate pain". Claimant did not indicate to PA Eatough that he had fallen and hit his left flank.

20. Emily Burns, M.D. ultimately became Claimant's treating provider for his claimed injury. Dr. Burns fist saw Claimant on January 18, 2022 during which appointment she noted MOI of "lifting cases of oil". (Resp. Ex. H, p. 80). On April 20, 2022, Dr. Burns noted that Claimant tried additional physical therapy, which "made his symptoms worse. . ." She also noted that Claimant was "working on getting approval for possible steroid injections followed by nerve ablation. Finally, she noted that Claimant had been evaluated by a neurosurgeon who did not recommend surgical intervention or restrictions for his spine. (Resp. Ex. H, p. 93). Physical examination revealed Claimant's persistent pain was "centered in the area of the spinal cord stimulator pack." *Id*. at p. 94. It was suggested that Claimant consider removal of the stimulator outside of the workers' compensation system. *Id*. Claimant was released by to "very light duty" and scheduled for a follow-up in 3-4 weeks. *Id*.

The Independent Medical Examination and Testimony of Dr. Gretchen Brunworth

21. Gretchen Brunworth, M.D., performed an independent medical examination (IME) of Claimant on April 21, 2022, which included a physical examination and range of motion measurements. (Resp. Ex. I). Dr. Brunworth's diagnoses included low back and leg pain. *Id*. at p. 102-103.

22. In her April 21, 2022 IME report, Dr. Brunworth noted that Claimant had "significant nonphysiologic findings and pain behaviors on examination. (Resp. Ex. I, p. 103). She also noted that he was "not a good historian based upon his inability to recall details of his prior accidents/injuries outlined in a lettered drafted to her by Respondents' attorney. *Id*. Accordingly, Dr. Brunworth concluded that, Claimant appeared to be "consciously misrepresenting his history" and that "significant

psychiatric/psychological issues [were] affecting his presentation". *Id.* Because Dr. Brunworth did not have what she considered to be a "full set" of records, including records surrounding Claimant's prior accidents/injuries or an EMG report, she deferred further opinions regarding additional work-related diagnoses (other than low back pain), apportionment and additional treatment needs. *Id.* at p. 103-104.

23. Dr. Brunworth testified by Deposition on July 19, 2022. She reiterated her belief that there was a probable component of malingering in this case because Claimant is "very inconsistent with his histories" and because Claimant "obviously had significant back and left leg pain within a week of this [November 2, 2021] incident." (Depo. Tr. Dr. Brunworth, p. 18, ll. 11-18). Dr. Brunworth testified that Claimant's lumbar symptoms were inconsistent with his narrative that he was injured from moving cases of oil on November 2, 2021. (Depo. Tr. Dr. Brunworth, p. 23, l. 14-15).

24. Dr. Brunworth testified that medical record in the case is devoid of any objective medical evidence that would support a "theory" that the November 2, 2021 incident caused, aggravated or accelerated the pre-existing degenerative changes within Claimant's lumbar spine to become symptomatic. (Depo. Tr. Dr. Brunworth, p. 20, ll. 13-19). Moreover, she testified that there is no objective evidence to suggest that Claimant has an annular tear in a disc to support Dr. Castrejon's suggestion that Claimant's symptoms may be emanating from a chemical radiculitis. Id. at p. 25-26, ll. 1-13. Accordingly, Dr. Brunworth testified that there is not a candidate for discography. Id. at lines 14-25. The ALJ finds from Dr. Brunworth's testimony that she believes Claimant's lumbar stenosis and current symptoms, including his urinary retention, bowel urgency and erectile dysfunction are a product of the natural progression of the pre-existing degenerative changes in his lumbar spine without contribution from the November 2, 2021 incident.

25. Dr. Brunworth testified that Claimant "had had the upper extremity problems for quite some time, and that the implantation of the stimulator was to treat the symptoms related to Claimant's prior upper extremity injury. Accordingly, the upper extremity symptoms and treatment therefore including the use of a stimulator were not related to the alleged November 2, 2021 incident." (Depo. Tr. Dr. Brunworth p. 16, ll. 7-11).

The Independent Medical Examination and Testimony of Dr. Miguel Castrejon

26. Claimant was seen by Dr. Miguel Castrejon for an IME on May 23, 2022. Following a records review and a physical examination of Claimant, Dr. Castrejon opined that while Dr. Brunworth concluded that Claimant consciously misrepresented his medical history and presented with many nonphysiologic findings, he (Dr. Castrejon) found no evidence of "conscious misrepresentation, i.e. malingering. (Clmt's Ex. 2, p. 245). Rather, Dr. Castrejon concluded that what is clear from the record is that "there has been no diagnosis offered to explain [Claimant's] current condition despite the documentation by multiple examiners of similar abnormal findings". *Id.*

27. Dr. Castrejon testified that the Claimant presented at his office with a cane although he did not know who recommended it. The Claimant did not remember many specifics of his previous motor vehicle accidents or injuries (or even that they occurred) without prompting by the doctor. He did remember that he had no residual effects from any accident aside from an initial ER visit. In assessing the Claimant's range of motion, Dr. Castrejon used an inclinometer and based upon the Claimant's symptoms and known dermatomal patterns, Dr. Castrejon opined that L4-5 and L5-S1 are probably the affected levels of the spine the Claimant is dealing with. Generally, stocking glove distribution of numbness distal to the knee on the left ***can*** be evidence of L4-5 and L5-S1 nerve root compression. (Depo. Tr. Dr. Castrejon p. 23, ll. 7-15).

28. When asked about the CT evidence of moderate bilateral L3-L4 and L4-L5 foraminal stenosis, Dr. Castrejon could not conclude that it relates back to the surgery performed by Dr. Sung as Dr. Sung's procedure involved only the L3-L4 level. (Depo. Tr. Dr. Castrejon p. 26, ll. 10-22). Dr. Castrejon testified that a person can develop back pain with radiculopathy without any known inciting event. *Id.* at p. 20, ll. 4-8). He also agreed that foraminal stenosis is a degenerative condition that develops over time and is not typically caused by an outside entity/event. *Id*. at. p. 26, ll. 23-25 through p. 27, ll. 1-6.

29. EMG results reflected evidence of a left limb chronic L4-L5 radiculopathy but not necessarily ongoing denervation or radicular process at the L4-L5 level (Dr. Castrejon Depo. p. 28-29). He explained that an EMG study does not show sensory radiculopathies so if the Claimant had that at either the L4-L5 or any other level, it would be missed on an electrodiagnostic study. (Depo. Tr. Dr. Castrejon p. 27-30). Dr. Castrejon further opined that the Claimant could have suffered an annular tear causing chemical radiculitis but without being able to do an MRI, one cannot be sure. Id. at p. 30, ll. 19-25. According to Dr. Castrejon, the only other diagnostic testing available (other than an MRI) would be to have the Claimant undergo a discogram to determine which level is causing the Claimant's symptoms. Id. at p. 31, ll. 9-19.

30. Dr. Castrejon confirmed with the Claimant the alleged MOI noting that Claimant reported that he was lifting a case of oil, lifted, rotated slightly, experienced a popping sensation accompanied by moderate to severe pain that extended into the left leg. (Depo. Tr. Dr. Castrejon p. 35, ll. 2-5). He also noted that Claimant reported falling backward into the cases of oil, which the ALJ finds would be inconsistent with causing a contusion and bruising to the flank and back. Id. at p. 35, ll. 6-25. Upon questioning the Claimant as to why he did not report the November 2, 2021 incident immediately, Dr. Castrejon testified that Claimant stated that he thought he would get better and would not require medical care. (Depo. Tr. Dr. Castrejon p. 36, ll. 9-16). Dr. Castrejon testified that his review of the medical records supports the Claimant's described MOI and that Claimant experienced two separate conditions involving his back, one on October 27, 2021 and one occurring November 2, 2021 causing both back and leg pain. Id. at p. 38, ll. 10-22, & p. 53, ll. 9-25 through p. 55, ll. 1-5.

31. The ALJ interprets Dr. Castrejon's deposition testimony to indicate that Claimant's current back and left leg pain is causally related to the November 2, 2021 event based upon the Claimant's presentation at Grandview Hospital on October 27, 2021. Indeed, the ALJ understands Dr. Castrejon's testimony to indicate that following the forceful vomiting event on October 27, 2021, Claimant's symptoms in the ER that day did not implicate the presence of an acute radicular process typically associated with disc related pain. In contrast, Claimant's neurologic presentation, on November 9, 2021, including his left leg and foot symptoms and significant proximal sensory disturbances, support a conclusion that Claimant's symptoms are radicular in nature and related to a discogenic source caused by the lifting incident occurring November 2, 2021.

The Deposition Testimony of Dr. Emily Burns

32. Dr. Emily Burns testified by deposition on May 24, 2022 and June 29, 2022. Dr. Burns testified that Claimant had previously seen her colleague and had given a history of "carrying cases of oil from the back hall up to the front' when he was injured. (Depo. Tr. Dr. Burns, Vol. I, p. 9, ll. 16-25). According to Dr. Burns, Claimant reported that he had one case of oil in his right hand and went to pick up another with the left, so he had to bend over and when he lifted this second case off the pallet, he felt a "pop and immediate pain in his lower back with left sided numbness". Id. at p. 10, ll. 3-7. Claimant did not report falling. Id. at p. 11, ll. 11-12, p. 28, ll. 2-15. Dr. Burns suspected that the reference to a fall may have been "dropped" from the record at some point, but that did not mean that the Claimant did not have a back injury. Id. at p. 29, ll. 8-17.

33. Concerning the EMG performed February 17, 2022, Dr. Burns testified that that the primary finding was "moderate chronic lumbar polyradiculopathy . . . affecting levels L4 and L5 without active denervation". (Depo. Tr. Dr. Burns, Vol. I p, 37, ll. 6-9. She testified that she would leave the determination of whether this finding estyablished any pathology related to the alleged November 2, 2021 incident to neurology or neurosurgery because that was a "pretty specialized question about the exact time frame relative to [Claimant's] injury and what happened. Id. at p. 37, ll. 11-21. Nonetheless, she later testified that the EMG, by report, "showed moderate chronic lumbar, several root involvement at L5-5 without active denervation, which suggested to her that the results of Claimant's EMG supported the existence of an "older injury, not necessarily a newer injury". (Depo. Tr. Dr. Burns, Vol. II, p. 49, ll. 17-24). Accordingly, Dr. Burns testified that it was less probable that the EMG findings related to anything that happened sometime in November 2021 while Claimant was at work. Id. at p. 50, ll. 7-18. She also agreed that the CT myelograms performed November 10, 2021 did not establish that Claimant's pathology, i.e. foraminal stenosis was caused by the November 2, 2021 incident Claimant reported occurred at work. Id. at p. 52, ll. 7-23.

34. Given the inconsistencies/omissions, i.e. Claimant's failure to report a fall when describing the MOI in this case coupled with the lack of corresponding findings on physical examination and diagnostic testing, Dr. Burns testified that there is "plenty of suggestion" to support a conclusion that Claimant's current symptoms are not related to an alleged incident occurring at work. (Depo. Tr. Dr. Burns, Vol. II, p. 57, ll. 2-11). Accordingly, Dr. Burns testified that she was "leaning" towards the conclusion that it was possible that Claimant's current symptoms are related to an event occurring at work, but she could not say it was probable. Id. at p. 58, ll. 14-20. Thus, Dr. Burns concluded that Claimant's symptoms were more likely emanating from the progression of Claimant's underlying degenerative disc disease rather than a fall or industrial injury as described by Claimant. Id. at p. 58, ll. 21-25 and p. 59, line 1.

35. Dr. Burns testified that while a history of Claimant's fall was included in his medical records, in his statement to prior providers, she "hadn't been aware of the fall because that wasn't reported to us". (Depo. Tr. Dr. Burns, Vol. II, p. 60, ll. 8-22). She went on to testify that this made Claimant's evaluation difficult and she questioned, "I think the question is now why -- you know, why did the story change [?]" Id. at p. 65, ll. 3-6.

36. Dr. Burns testified that due to Claimant's inconsistent story, it made diagnosing him difficult, stating, **"**I can't honestly sort out exactly what happened . . . it does not sound as straightforward as everything was fine, then I lifted a can of oil at work, and then I had back pain and have had it ever since." (Depo. Tr. Dr. Burns, Vol. II p. 68, ll. 2-13). Thus, Dr. Burns concluded that it was not probable that Claimant's described MOI would aggravate his underlying pre-existing condition. Id. at p. 67-68.

Claimant's Hearing Testimony

37. The Claimant testified that he did not fill out all of the questions on the First Notice of Accident Report Form (Resp. Ex. A, p. 5). Indeed, Claimant testified that he did not fill out the sections of the form regarding the date, time, and location the incident was reported. Those specifics were filled out by Douglas L[Redacted]. The Claimant testified further that he did not fill out certain portions of the form entitled "Actions Preceding the Incident Completed by the Employee". (See Resp. Ex. A, p. 6). He testified that the date written on that form (on the same line as his signature) was not written by him.

38. The Claimant testified that he has a history of alcohol and drug addiction, but that he has been sober for three years. He acknowledged on cross-examination that, at times, he has problems with his memory and has to be reminded of things.

39. Claimant has a significant medical history of injury to his low back going back many years, which has resulted in prior surgery. He also underwent placement of a spinal cord stimulator secondary to an injury to his upper extremity. Claimant testified that in 2016 he had a previous successful lumbar spine surgery performed by Dr. Roger

Sung. He testified that he had no problems subsequent to the surgery. He also testified that he was involved in previous motor vehicle accidents. He explained that he did not remember some of them and that none of them involved any follow up care (post hospital ER visit). He explained that the fact that his memory is not good and that he did not receive any follow up care (post ER visit) were the main reasons that he did not mention the accident(s) to many of the physicians who saw him with regards to this injury. On cross-examination, the Claimant did not remember a claim he made against 7-11 in 2001; a motor vehicle accident in February of 2015; or a visit to UC Health in July of 2015 where he got x-rays of his neck. He did remember presenting to Memorial Hospital on July 21, 2017, with stroke like symptoms where he was informed his symptoms were a result of a migraine headache. He also remembered a rear-end motor vehicle accident on November 14, 2019, which he described as a "fender bender". He does not recall whether he sought any treatment as a result of this accident. He also acknowledged a motor vehicle accident, which occurred in January of 2020, where he did go to the emergency room but did not receive any follow-up treatment after that. Finally, he acknowledged the October 27, 2021, incident where he thought he had COVID and had broken or "popped" a rib due to coughing and vomiting. He does not remember complaining of any left leg pain at that time.

*The Hearing Testimony of D*L[Redacted]

40. DL[Redacted] testified as Claimant's direct supervisor. He testified that he did not witness the Claimant injure himself. He acknowledged Employer's immediate reporting policy if an employee is hurt on the job. Nonetheless, he could not recall [Claimant] contacted him on November 2, 2021 to report an industrial injury. Indeed, he could not remember if the Claimant contacted him at any time between November 2 and November 5 to report the alleged injury nor could he recall if Claimant, at any point in time during the week of November 2 through November 5, notified him that he was having difficulties performing his job duties. He testified that on November 6, 2021, he received a text message from Claimant stating that he would not be able to come into work but the text did not explain the reason for his absence.

41. Mr. DL[Redacted] also testified that on November 9, 2021, Mr. WM[Redacted] notified him that Claimant had a very large bruise on his back. He remembers that Claimant had a cane in his hand and was not moving very well at that time. He acknowledged that upon seeing the bruising, he sent immediately directed Claimant to the hospital. He acknowledged that he never asked Claimant the date of the accident. Rather, he completed much of the First Notice of Accident Report Form including the portion that called for the date and time of the accident, which he simply reported as 11/9/2021.

42. Mr. DL[Redacted] also acknowledged that he could not remember if November 9, 2021, was the first date that he had been made aware of the Claimant's injury. He testified that Claimant told him that he did not immediately report the incident because he was afraid he would lose his job.

43. Claimant's medical records support a finding that he was taken off work on December 27, 2021 by PA Eatough under the supervision of Dr. Bisgard. (Clmt's Ex. 1, p. 228). Moreover, Dr. Burns continued Claimant's off work status through April 20, 2022, when she noted she would return Claimant to "very light duty." While Dr. Burns released Claimant to light duty, the evidence presented fails to persuade the ALJ that Employer accommodated the restrictions outlined in Dr. Burns' April 20, 2022 report (Clmt's Ex. 3, p. 297) in a modified duty position.

CONCLUSIONS OF LAW

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

Generally

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

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

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

C. Assessing the weight, credibility and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence presented. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of

the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

D. Here, a question exists regarding whether the MOI described by Claimant may be causative of his alleged increased back/leg pain and the findings demonstrated on post injury imaging. As presented, the evidence persuades the ALJ that, consistent with the opinions of Dr. Castrejon, Claimant likely suffered two separate injuries causing pain in his low back and in reference to the November 2, 2021 incident, corresponding sensory disturbances and radicular pain in the left leg and foot. The ALJ credits Claimant's testimony and the opinions of Dr. Castrejon to conclude that the November 2, 2021 lifting incident, while Claimant was stocking cases of oil, probably aggravated an already compromised, surgically altered and diseased low back, worsening the pain caused by his vomiting episode on October 27, 2021, giving rise to new sensory disturbances, i.e. saddle aesthesia, urinary retention and erectile dysfunction in addition to radicular pain in the left leg/foot. While Claimant did not initially report that he fell forward striking his flank on the cases of oil after feeling a "pop/snap" in his low back, the severe bruising visible by medical personnel on November 9th, seven days after the alleged November 2, 2021, incident provides sufficient circumstantial evidence of a fall/insult to the left side of the body. Moreover, Claimant has consistently indicated that the lifting associated with his stocking duties on November 2, 2021 is causative of his symptoms, not the fall. Given Claimant's self-observed memory problems coupled with his consistent report that the lifting caused a pop/snap followed by pain which he thought would improve on its own, the ALJ is not surprised that Claimant failed to reference the fall as a major aspect of his November 2, 2021 injury. Given the totality of the evidence presented, the ALJ is convinced that Claimant probably did suffer an aggravation of a pre-existing condition, i.e. his degenerative disc disease, as a consequence of lifting cases of oil on November 2, 2021.

Compensability

E. A "compensable" injury is one that requires medical treatment or causes disability. *Romero v. Industrial Commission*, 632 P.2d 1052 (Colo. App. 1981); *Aragon v. CHIMR, et al.*, W.C. No. 4-543-782 (ICAO, Sept. 24, 2004). No benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury." *Romero*, supra; §8-41-301, C.R.S. To sustain his burden of proof concerning compensability, Claimant must establish that the condition for which he seeks benefits was proximately caused by an "injury" arising out of and in the course of employment. *Loofbourrow v. Industrial Claim Appeals Office*, 321 P.3d 548 (Colo. App. 2011), ***aff'd*** *Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014); *Section 8-41-301(I)(b), C.R.S.*

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

and a claimant must meet both requirements for the injury to be compensable. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). An injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976).

G. The "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. *Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). It is the burden of the claimant to establish causation by a preponderance of the evidence. *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo.App.2000). There is no presumption that an injury which occurs in the course of employment also arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968). The evidence must establish the causal connection with reasonable probability, but it need not establish it with medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo.App.1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. Medical evidence is not required to establish causation. To the contrary, lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado, 717 P.2d 1000 (Colo.App.1986).* In this case, Claimant contends that the evidence supports a conclusion that he has proven that his low back injury occurred during the time and place limitations of his employment and arose out of his stocking duties for Employer.

H. On the other hand, Respondents contend that the inconsistencies in the record regarding the exact mechanism of injury (MOI) combined with the pre-existing condition of Claimant's lumbar spine warrant a very different conclusion. Respondents maintain that the evidence presented more convincingly supports the conclusion that Claimant's symptoms represent natural and probable progression of his underlying degenerative disc disease, which was probably aggravated by the events of 10/27/2021 involving forceful vomiting causing something to "explode" in his left flank rather than any incident occurring November 2, 2021. Simply put, Respondents contend that Claimant's low back/leg pain and his subsequent disability and current need for treatment are not related to any incident that occurred November 2, 2021. The ALJ is not persuaded.

I. The determination of whether there is a sufficient "nexus" or causal relationship between a claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question*

Submitted by the United States Court of Appeals, 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996). Although there are inconsistencies in the record regarding the MOI in this case, the ALJ resolves those conflicts in favor of Claimant to find and conclude that he probably lifted a case of oil while bending to the left leading to a sudden outset of symptoms in his low back/leg, which caused him to fall forward into the product he was stocking for employer. In reaching this conclusion, the ALJ is mindful that Claimant had experienced back pain on October 27, 2021, yet the evidence presented supports a conclusion that Claimant had returned to work after getting sick on October 27, 2021 and was working without restriction on November 2, 2021. Contrary to the suggestions of Dr. Burns and Dr. Brunworth, the evidence presented fails to support a conclusion that Claimant's left-sided paresthesia's and radicular pain originated as a result of the October 27, 2021 or the natural progression of a pre-existing condition. Rather, the evidence presented supports a conclusion that the onset of Claimant's radicular symptoms and symptoms originally thought to represent cauda equina syndrome arose immediately after the November 2, 2021 lifting incident and progressively worsened until Claimant was forced to seek treatment on November 9, 2021.

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

K. While pain may represent a symptom from the aggravation of a pre-existing condition, the fact that Claimant may have experienced an onset of pain while performing job duties does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, as asserted by Respondents, the occurrence of symptoms at work may represent the result of the natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (August 18, 2005).

L. Based upon the totality of the evidence presented, the ALJ credits the opinions of Dr. Castrejon to find and conclude that Claimant probably suffered an acute aggravation of a pre-existing condition in his low back on November 2, 2021 giving rise to his reported radicular pain and proximal neurologic symptoms, including saddle

aesthesia, urinary retention and erectile dysfunction. While the ALJ is not convinced that the November 2, 2021 incident caused any of the degenerative findings in Claimant's lumbar spine, the aforementioned symptoms/sensory disturbances are directly traceable to Claimant's stocking duties on November 2, 2021. The evidence presented persuades the ALJ that Claimant's symptoms and functional decline after November 2, 2021, as well as his need for treatment were probably related to this acute aggravation. In concluding as much, the ALJ rejects Respondents' suggestion, based primarily on the opinions of Dr. Burns and Dr. Brunworth that Claimant's disability and current need for treatment is the culmination of the natural progression of a pre-existing condition in Claimant's back following his prior injuries and subsequent surgeries to his lumbar spine. The ALJ finds and concludes that Claimant has established the requisite causal connection between his employment duties and his medical condition. Accordingly, the ALJ concludes that the claimed injury is compensable.

Claimant's Entitlement to Medical Benefits and Authorization to Treat

M. As noted above, Claimant bears the burden of proving entitlement to benefits by a preponderance of the evidence. This includes medical treatment. *See Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997); *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). Once a claimant has established a compensable work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary medical care to cure and relieve the effects of the work injury. *Section 8-42-101, C.R.S.*; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, supra. Regardless, Respondents are only liable for authorized treatment. Authorization refers to a physician's legal status to treat the industrial injury at the respondents' expense. *Bunch v. Industrial Claim Appeals Office*, 148 P.3d 381 (Colo. App. 2006); *Popke v. Industrial Claim Appeals Office*, 944 p.2d 677 (Colo. App. 1997).

N. Under §8-43-404(5) (a) (I) (A), C.R.S. 2018 the employer has the right in the first instance to designate the authorized provider to treat the claimant's compensable condition. The rationale for this principle is that the respondents may ultimately be liable for the claimant's medical bills and, therefore, have an interest in knowing what treatment is being provided. *Andrade v. Industrial Claim Appeals Office*, 121 P.3d 328 (Colo. App. 2005). Consequently, if the claimant obtains unauthorized medical treatment, the respondents are not required to pay for it. Section 8-43-404(7), C.R.S. 2005; *Yeck v. Industrial Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999); *Pickett v. Colorado State Hospital*, 32 Colo. App. 282, 513 P.2d 228 (1973).

O. As noted, § 8-43-404(5) (a), C.R.S. affords an employer or its insurer the right in the first instance to select a physician to treat the injury. The statute requires the employer or insurer to "provide a list of at least four physicians . . . in the first instance, from which list an injured employee may select the physician who attends said injured employee." Similarly, Workers' Compensation Rules of Procedure, Rule 8-2(A), 7 Code Colo. Reg. 1101-3, states that "[w]hen an employer has notice of an on

the job injury, the employer or insurer shall provide the injured worker with a written list . . .” In order to maintain the right to designate a provider in the first instance, the employer has an obligation to name the treating physician forthwith upon receiving notice of the compensable injury. *See Rogers v. Industrial Claim Appeals Office,* 746 P.2d 545 (Colo. App. 1987). The failure to tender the "services of a physician . . . at the time of injury" gives the employee "the right to select a physician or chiropractor." The employer's duty to designate is triggered once the employer or insurer has some knowledge of facts that would lead a reasonably conscientious manager to believe the case may involve a claim for compensation. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *Jones v. Adolph Coors Co.,* 689 P.2d 681 (Colo. App. 1984); *Gutierrez v. Premium Pet Foods, LLC*, W.C. No. 4-834-947 (ICAO, September 6, 2011).

P. In this case, the record contains substantial evidence to support a conclusion that the medical care Claimant received through UC Health, Dr. Emily Burns and Dr. Kenneth Finn was reasonable, necessary and related to the November 2, 2021 injury to cure and relieve his symptoms. Accordingly, the ALJ finds Respondent’s liable for the costs of this care. Moreover, the record supports a conclusion that Claimant probably requires additional treatment, to cure and relieve him of the ongoing effects of his November 2, 2021 industrial injury. Indeed, the medical reports outline persistent pain and functional decline secondary to neurologically correlated pain, lower extremity weakness and decreased sensation, leading Dr. Castrejon to recommended additional treatment and diagnostic testing. Nonetheless, it is necessary to determine who is authorized to provide such care.

Q. As noted above, an employer's duty to designate a medical provider in the first instance is triggered once the employer or insurer has some knowledge of facts that would lead a reasonably conscientious manager to believe the case may involve a claim for compensation. The questions of whether Employer failed to timely tender the services of a physician and the right of selection passed to Claimant are questions of fact for resolution by the ALJ. *See Ruybal v. University Health Sciences Center,* 768 P.2d 1259 (Colo. App. 1988); *Buhrmann v. University of Colorado Health Sciences Center,* W.C. No. 4-253-689 (November 4, 1996). In this case, the ALJ concludes that Claimant probably informed Mr. P[Redacted] that he injured his back while stocking oil on November 9, 2021. Based upon the evidence presented, the ALJ finds/concludes that Employers duty to select a provider to treat Claimant’s injury was triggered November 9, 2021 and Employer timely tendered the services of a physician as required by statute at that time.

R. Authorized providers include those medical providers to whom the claimant is directly referred by the employer, as well as providers to whom an authorized treating provider (ATP) refers the claimant in the normal progression of authorized treatment. *Town of Ignacio v. Industrial Claim Appeals Office*, 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). Whether an ATP has made a referral in the normal progression of authorized treatment

is a question of fact for the ALJ. *Suetrack USA v. Industrial Claim Appeals Office*, 902 P.2d 854 (Colo. App. 1995). Here, Claimant was originally seen on an emergent basis at Grandview Hospital Emergency Room. The physicians then transferred him to Memorial Hospital Central who, at the point of discharge, referred Claimant to Dr. Emily Burns and for a neurosurgical evaluation. (Clmt's Ex. 1, p. 214). Respondents designated UC Health Occupational Medicine Clinic to treat the Claimant. He was seen by Dr. Elizabeth Bisgard and Dr. Emily Burns to attend to the claimed injury pursuant to W.C.R.P. 8-2(A) and C.R.S. § 8-43-404(5)(a)(I)(A). The Claimant has not been treated outside of the chain of referral for which benefits are sought. Consequently, the ALJ concludes that the providers at UC Health and those providers to whom they referred Claimant are designated providers and authorized to treat Claimant under this claim.

Claimant's Entitlement to Temporary Disability Benefits & Respondents Request for Late Reporting Penalties

S. To receive temporary disability benefits, a claimant must prove the injury caused a disability, he/she leaves work as a consequence of the injury, and the disability is total and lasts more than three regular working days. *C.R.S. § 8-42-103(1); PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). As stated in *PDM Molding*, the term "disability" refers to the claimant's physical inability to perform regular employment. *See also McKinley v. Bronco Billy's,* 903 P.2d 1239 (Colo. App. 1995). Once the claimant has established a "disability" and a resulting wage loss, the entitlement to temporary disability benefits continues until terminated in accordance with C.R.S. § 8-42-105(3)(a)-(d). Here, the evidence presented persuades the ALJ that PA Eatough, under the direction of Dr. Elizabeth Bisgard, who reviewed PA Eatough's treatment record, removed Claimant from work due to the ongoing effects of his low back injury on December 27, 2021 (Clmt's Ex. 1, p. 228). Furthermore, the medical records reflect that Claimant continued to be restricted from working per Dr. Burns until April 20, 2022 when she released him to "very light duty". (*See* Clmt's Ex. A, pp. 250, 254, 269, 281, 297). Nonetheless, Respondents failed to demonstrate that they accommodated Claimant's restrictions by offering him modified duty. The ALJ credits the medical record and Claimant's testimony to find that he has been unable to perform the full range of his work duties since December 27, 2021 and Respondents failed to offer modified duty. Consequently, Claimant is "disabled" within the meaning of section 8-42-105, C.R.S. and is entitled to TTD benefits from December 27, 2021 and ongoing. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999); *Hendricks v. Keebler Company*, W.C. No. 4-373-392 (Industrial Claim Appeals Office, June 11, 1999).

T. Respondents seek a penalty against Claimant for his alleged failure to timely to report the injury in writing as required by § 8-43-102(1) (a), C.R.S. Section 8-43-102(1) (a) provides that an employee that sustains an injury from an accident "shall notify the said employee's employer in writing of the injury within four days of the occurrence of the injury." If the employee fails to report the injury in writing, "said employee may lose up to one day's compensation for each day's failure to so report." Because the statute uses the word "may," imposition of a penalty for late reporting is left

to the discretion of the ALJ. *LeFou v. Waste Management*, W.C. No. 4- 519-354 (ICAO March 6, 2003). In this case, the evidence overwhelming supports a conclusion that Claimant failed to submit a written report of injury until November 9, 2021. Based upon the evidence presented, including the testimony of Ms. M[Redacted] and Mr. DL[Redacted], the ALJ is persuaded that Claimant was probably aware of the reporting requirements for work-related injuries. Nonetheless, Claimant was not entitled to lost wages until December 27, 2021, more than one month after he filed his written report of injury, when he was taken off work by PA Eatough. Accordingly, the ALJ refuses to impose a penalty for late reporting.

ORDER

It is therefore ordered:

1. Claimant's November 2, 2021 claim for work-related injuries to his low back/left leg is compensable.

2. Respondents are liable for Claimant's treatment with UC Health in addition to any treatment he obtained as part of the referrals received from UC Health. All medical expenses shall be paid pursuant to the Workers' Compensation medical benefits fee schedule.

3. Respondents shall pay TTD in accordance with C.R.S. § 8-42-103(1)(b), for the period beginning December 27, 2021 and ongoing at a rate of sixty-six and two-thirds percent of Claimant's average weekly wage (AWW), but not to exceed a maximum of ninety-one percent of the state average weekly wage per week. C.R.S. § 8-42-105(1).

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

5. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

DATED: September 28, 2022

/s/ Richard M. Lamphere

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

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

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that he was injured in the course and scope of his employment on February 3, 2021.

ONLY IF CLAIMANT HAS PROVEN COMPENSABILITY,

II. Whether Claimant has proven that he is entitled to reasonably necessary medical benefits related to the February 3, 2021 incident.

III. Whether Claimant is entitled to reasonably necessary medical benefits and whether Claimant has proven that the treatment he obtained was authorized within the chain of referral and or by a provider on a designated provider list.

IV. Whether the lumbar spine, right shoulder and neck conditions were caused by that compensable event.

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

VI. Whether Claimant has proven by a preponderance of the evidence that he is entitled to a specific average weekly wage.

VII. Whether Respondents have proven by a preponderance of the evidence that Claimant was either responsible for termination or that his wage loss was not a result of the compensable event.

VIII. Whether Respondents have proven by a preponderance of the evidence that there should be a reduction in compensation due to Claimant's late reporting of the injury pursuant to Sec. 8-43-102(1)(a), C.R.S.

PROCEDURAL HISTORY

Claimant filed an Application for Hearing on December 10, 2021 through prior counsel on the above listed issues. Respondents filed a Response to Application for Hearing dated January 6, 2022 adding the above defenses.

A hearing was convened on May 10, 2022 before this ALJ. Following a *pro se* advisement to the self-represented Claimant, Claimant made a motion to continue the hearing in order to obtain the services of another attorney. Claimant explained that he had hired two separate lawyers and that the last lawyer withdrew from representing him. The order approving the withdrawal of counsel was issued by ALJ Peter J. Cannici on April 28, 2022. Claimant indicated that he had no funds to pay an attorney and was requesting that he be assigned an attorney *pro bono.* This ALJ provided Claimant information that, under Colorado law, attorneys in workers' compensation matters were limited to charging fees based on Sec. 8-43-403(1), C.R.S. in the amount of twenty

percent on contested benefits, upon winning the claim. Over Respondents' objections, this ALJ found good cause for a continuance in this matter, issuing an order dated May 11, 2022. This ALJ suggested to Claimant that he to obtain a list of attorneys promulgated by the Colorado Bar Association Workers' Compensation Section from the OAC staff for his convenience. Claimant was further admonished that the case would be reset for hearing within 60 days of the date of this hearing and Claimant must have taken affirmative steps to secure the services of an attorney or the case would proceed without assistance of counsel. Claimant was provided with a large packet of records of approximately 2,424 pages which included all medical record in Respondents' possession. Respondents indicated that they would be culling the records to a more manageable size for the continued hearing and that it would be Claimant's responsibility to submit any exhibits he wished for the court to consider.

At the commencement of the July 8, 2022 hearing, Claimant indicated that he had contacted a couple new attorneys but that they had not yet responded. This ALJ found that this action was not sufficient affirmative steps to further continue the hearing and the hearing proceeded forward. This ALJ, again, provided a *pro se* advisement.

FINDINGS OF FACT

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

1. Claimant was 55 years old at the time of the last hearing in this matter. He worked as a foreman assistant for Employer on February 3, 2021. Employer is a company providing landscaping and snow removal for residential and commercial clients. Snow was expected the following day, and Claimant was instructed to take one of the Employer's trucks and to hook up a snow plow on the truck before leaving the Employer's place of business. Claimant clocked out of work on February 3, 2021 at approximately 4:30 p.m. but was paid for an additional hour and one half to perform any tasks necessary to accomplish the work needed for the next day, including hooking up the plow to the work truck while at the shop and collect any other tools needed to perform the work the next day. Claimant was assigned to do the snow removal for specific client properties in Northwest Denver, close to where Claimant lived.

2. Claimant was driving away from Employer's shop, after having hooked up a snowplow to the Employer's truck, when he was involved in a hit and run motor vehicle accident while driving westbound on Arapahoe Road. Claimant stated that he was on his way to assess the parking lots where he was assigned to do snow removal on the following day, if there was any snow fall. The hit and run motor vehicle accident (MVA) occurred at approximately 5:08 p.m. in Greenwood Village, many miles south of his home and the properties Claimant was responsible for plowing. The truck was hit by a U-Haul truck on the front right side of the plow. Claimant stated that the person driving the U-Haul van immediately left the accident scene and parked at a Motel 6, then fled from the place of the accident, abandoning the U-Haul truck. Claimant followed the driver but was unable to locate him. He returned to his vehicle, and he flagged a police officer that was responding to another call at the Motel 6, where he found the abandoned the damaged U-Haul truck. That police officer called in further help and an investigation commenced

relating to the hit and run. Claimant also called the Employer's shop to report the accident.

3. The second officer arrived at the scene and was investigating the U-Haul truck when a woman approached. When questioned, she informed the officer that the driver had departed because he had outstanding warrants against him. She later revised her story, in order for the U-Haul not to be towed, stating that she was the driver of the vehicle. Claimant spoke with the police officer, denying that the woman was the driver, stating that the drive had been male, but that Claimant would not recognize his face. The police officer confirmed that the woman had not been driving the vehicle by reviewing video footage from the Motel 6 that showed that a male parked the U-Haul truck at the Motel 6 and departed.

4. Footage of the police body cameras were reviewed and did not show any significant indications that Claimant was injured. It specifically showed Claimant walking without any difficulty as he spoke to the officers and walked back and forth from his truck to the U-Haul truck to take photographs. He also got in and out of his truck and stood against his truck filling out paperwork at chest level, turning his head without difficulty.

5. The police reports failed to show any particular notifications or reports of injuries. Claimant did not request the services of an ambulance and was seen walking in the parking lot, completing paperwork without indications of injuries or altered movement patters. In fact, while Claimant stated that he was injured in the collision, including injuries to his neck, teeth, low back, right knee and right shoulder, Claimant confirmed that he did not report any injuries at the time of the accident to either the police or his employer justifying this omission because he was frightened and nervous. The officer body camera video failed to show Claimant as an individual that was either frightened or nervous and this assertion was not credible.

6. Mr. C[Redacted] was Claimant's direct supervisor. Mr. C[Redacted] testified that it did not snow on either February 3, 2021 or February 4, 2021. Mr. C[Redacted] testified that Claimant was not sent out on an assignment to clear snow on February 3, 2021 as it did not snow greater than two inches. Claimant was told that snow was expected, and told to get the truck at the shop, hook up the plow, and take the truck home so that, if it did snow, he could go to his assigned properties and plow. Mr. C[Redacted] stated Claimant was not being paid at the time the accident occurred. Claimant was not paid for travel time or to go to inspect the property he was to plow the next day, if it snowed, and he was not paid to be on call. Mr. C[Redacted]'s testimony was corroborated by other Employer witnesses and was credible.

7. Claimant called Mr. C[Redacted] from the motel after the incident occurred. Mr. C[Redacted] asked Claimant if he was hurt and Claimant just reported the damage to the truck and plow. Mr. C[Redacted] asked Claimant if the truck was operational, and Claimant said it was.

8. Claimant reported to work the next morning between 7 a.m. and 8 a.m. and met with Mr. C[Redacted] and Mr. W[Redacted], the Safety Manager. A report was completed regarding the incident with Claimant's assistance. There was no mention of injury in the report. Claimant, Mr. C[Redacted] and Mr. W[Redacted] were involved in the meeting, discussing the incident. During the meeting Claimant was asked if he was injured by both his supervisor and the Safety Manager and he responded that he was fine. In the meeting, all, including Claimant, agreed that Claimant was off the clock when the accident occurred and was on his way

home. Claimant returned to his regular work for several weeks, as shown by the check stubs, performing his regular job without limitations.

9. As found, there was no snow on February 3 or February 4, 2021. Claimant's timecard detail showed the date, location, type of work done and payment per hour. When he worked snow removal, "plowing" was indicated, and he was paid $25 per hour for that regular time and $37.50 for overtime worked. Claimant's regular work for clients was indicated as "Labor Hardscapes" or "Labor-Unbillable." and paid at a rate of $17.00 per hour. For example, on February 3, 2021, he was paid 9 hours for "Labor Hardscapes." This matches Claimant's handwritten sheet, with Claimant clocking out at 4:30. Claimant was not paid for plowing on February 3, 2021, February 4, 2021, or February 5, 2021. He was paid for landscaping work. Mr. C[Redacted] testified that there had been no snow and Claimant did not plow and did not say he had plowed when he met him the following morning, on February 4, 2021, to discuss the incident and complete the incident report.

10. Claimant submitted Exhibit 10 of 2, which contained a handwritten timesheet purporting to reflect plowing on February 4, 2021. This document was unfamiliar to the Employer witnesses. All testified that they had not seen it before. In general, Claimant used the same type of form, completed his time himself in his handwriting, and turned the forms in to be paid. The handwritten timesheets were the basis for his Timecard Details and pay.[1] Appearing a few times in the hearing packet was a handwritten Daily Job report which represented claimant working from 2 a.m. until 3:30 a.m. on February 4, 2021. Claimant represented this was evidence that he had plowed snow after the U-Haul incident and before appearing at work on February 4, 2021, apparently arguing that this put the incident that occurred on February 3, 2021 at 5:08 p.m. within the course and scope of employment. Mr. C[Redacted] testified that it appeared to him that Claimant had created the handwritten time sheet for purposes of the hearing.

11. Ms. E[Redacted], the Human Resources Manager, testified that Claimant had not turned in a February 4, 2021 timecard showing snow plowing for payment. Claimant's Timecard Detail did not reflect that this was claimed as time worked. Claimant testified that the plow had been damaged and that he had difficulty using it after the incident. Mr. C[Redacted] met Claimant that morning to look at the damage on the plow and do the report, and testified that it had not snowed, it would not make sense to plow, and Claimant did not mention plowing in the early morning with the damaged plow. Mr. C[Redacted]. testified that Claimant was not paid for plowing in the pre-dawn hours of February 4, 2021. They testified that Claimant never complained about not being paid for snow plowing work. There were several weeks between February 4, 2021 and when Claimant quit his employment in late March, 2021, and ample opportunity for him to rectify it if he had actually turned that time in and been unpaid. The handwritten timecard Claimant presented to the court showing plowing work on February 4, 2021 is not credible, and is not evidence that he was in the course and scope of his work at the time of the U-Haul incident.

12. On February 17, 2021, Employer was provided a letter regarding a UM/UIM and Med pay claim Claimant was bringing against Employer's auto carrier, Selective Insurance Company of America. Employer noted that this was the first they had learned that Claimant was alleging any injury associated with the incident of February 3, 2021.

[1] Timecard and handwritten sheet match: 6 hours at one client and 4 hours at another, neither of which was the assigned snow plowing addresses.

After receipt of that letter, Mr. C[Redacted], Mr. W[Redacted] and Ms. E[Redacted] called a meeting with Claimant, scheduled for February 18, 2021, to ask him about the claimed injury under their auto policy. For the first time during that meeting, Claimant indicated that he had started feeling right knee pain and hired an attorney. Claimant had brought an invoice for his initial visit along with an order from his doctor for a knee x-ray. Claimant was told that this would be passed on to the auto insurance carrier, which it was pursuant to an email dated the same day. Ms. E[Redacted] testified that Claimant agreed he was off the clock when the incident happened. Claimant testified that he said this because he was frightened and intimidated at this meeting, and that Ms. E[Redacted] stood behind him and yelled at him for retaining an attorney. Ms. E[Redacted], Mr. C[Redacted], and Mr. W[Redacted] all credibly testified this was untrue and denied that this occurred. Ms. E[Redacted] testified that she asked Claimant for a doctor's note regarding any restrictions he had as a result of his knee complaints. Claimant provided no restriction report. Ms. E[Redacted] followed up with Claimant three times, asking for restrictions, and he still did not provide one.

13. Claimant worked until March 25, 2021. At that time Claimant told Mr. C[Redacted] and Ms. E[Redacted] that he had found another job that paid him more money and was closer to his home. At hearing Claimant testified that Employer was taking away his hours. Mr. C[Redacted] testified that at the time he quit, Claimant did not complain that Employer was taking away hours. Mr. C[Redacted] testified that Employer was not taking hours away from him. Hours for the employees depended upon the needs of the clients and varied over time.

14. Claimant initially filed a Workers' Compensation Claim against the wrong employer and wrong carrier on or about July 13, 2021.[2]

15. Since February 18, 2021, Claimant sought treatment from several providers and underwent surgeries. By the time of the hearing, he had undergone a right knee surgery, a lumbar spine fusion, right shoulder surgery and cervical fusion. Most of these records were not made available to Respondents. These surgeries have been paid for through Medicaid, according to Claimant's testimony.

16. Dr. Fall evaluated Claimant on January 13, 2022 and testified by deposition on March 4, 2022 as an expert in occupational medicine, physical medicine and rehabilitation, causation analysis, as well as a Level II provider fully accredited by the Division. Her conclusion was that Claimant did not sustain any injury that required medical treatment as a result of the event of February 3, 2021. During her interview with Claimant, he was very evasive about how he claimed he was injured. Claimant eventually told her that he put pressure on his right leg applying the break, and damaged his right knee. He said he just felt pain in his neck, low back and right shoulder while he was sitting in the seat. He did not identify any movement inside the vehicle or say that he had hit anything inside the vehicle. Dr. Fall also pointed out that medical records reveal that Claimant experienced an intervening lumbar injury, reporting to the emergency room on August 2, 2021 and saying that he bent over and had immediate worsening of chronic low back pain. This lead to surgery on August 6, 2021 for Claimant's pre-existing severe

[2] Claimant's Workers' Compensation Claim form indicated Employer was Stake Center Locating, and S and N Communications Inc., and the insurer as First Liberty Insurance Corp. who were not parties to this claim. This was not notice of a work related injury to his Employer or their Insurer.

lumbar stenosis and degenerative spondylosis superimposed on L4-5 degenerative anterior spondylolisthesis.

17. Dr. Fall noted that, by description of the U-Haul accident, the main direction of the force from the U-Haul would be a sideswipe, which would not be expected to cause any significant force or movement to a restrained driver in the vehicle. Injuring the knee as the result of slamming on the breaks was highly unlikely. In addition, there was a lack of medical documentation and lack of a report of injury on the day of the event or even close to the MVA.

18. Dr. John Hughes evaluated Claimant, at claimant's request, for an independent medical examination on February 14, 2022. Claimant reported he had pain and symptoms all over his body immediately after the collision. After hearing Claimant's various complaints and history, including complaints of the neck, shoulders, arms, extremities and the low back pain, Dr. Hughes only concluded that Claimant's right knee was injured in the incident. His basis for this was Claimant's history and his conclusion that Claimant had developed an acute medial meniscus tear in the right knee. Among the history provided to Dr. Hughes was that Claimant was "perfect" after a prior 2016 work injury and a prior 2018 motor vehicle accident. Dr. Hughes did not have prior medical records and was dependent upon Claimant's representations. Dr. Hughes indicated Claimant was at MMI and had a work related rating of 10% lower extremity for the right knee.

19. Neither Dr. Fall nor Dr. Hughes had many relevant pre-injury records at the time of their reports. Neither of them viewed the body camera video on the date of the alleged injury. Review of those records shows clearly that Dr. Hughes' conclusions are based upon a faulty history provided by Claimant. Claimant's pattern of keeping one medical provider uninformed about what went before them is evident from the medical records. Claimant in fact already had a 12% rating for right knee pain under his prior 2016 work injury claim. This rating was admitted and PPD benefits were paid based upon that rating. Long after the settlement of that claim and a year before this claim, Claimant was awaiting surgery for the right knee.[3] He was taking medication because of his low back and right knee pain for years and continued to do so within months of the incident.

20. Dr. Hughes's opinion that the right knee was injured during the U-Haul event was based upon inaccurate information and is not credible or persuasive. Dr. Fall's opinion is found more credible than any contrary opinions. As found, Claimant did not sustain a new injury or aggravation of the preexisting condition because of the U-Haul incident.

21. Although Claimant is claiming new injuries, Claimant was certainly not "perfect" after his 2016 work injury as he attempted to obtain benefits and treatment after that incident. In fact, he claimed he was permanently and totally disabled.[4] As a result, he received a lump sum and structured settlement that continues to pay out. At the time of MMI on July 19, 2018, ATP Dr. Yusuke Wakeshima's notes show 13 alleged work related problems in his assessment. This included low back and neck pain, which had been treated under the 2016 work injury until a full medical record review showed they

[3] This was documented by Dr. Joshua Emdur, D.O. on February 6, 2020 at Clinica Colorado, who reported: "Right knee pain 9/10 constant sharp pain. Awaits surgery." It also reports "Back pain 6/10 sharp constant and radiates to left leg." See Ex. I, Bates 597

[4] See Ex. FF, Bates 2265, and 2277-2283, see specifically Bates 2280, Section 9(A)(8).

were in fact pre-existing and not related to the work injury. Claimant received a 13% whole person impairment and a 5% mental impairment under the 2016 workers' compensation claim. He signed the settlement documents in that claim on November 19, 2018 and an Order approving the settlement was signed by Director Paul Tauriello on November 21, 2022.

22. Claimant was involved in an MVA on October 14, 2018, before signing the settlement documents from his claim of permanent total disability due to his claimed knees, neck and back complaints. Records from the Bovidilla Clinic state,

> [Claimant] reported that before the 10-14-2018 accident he was under care for a workers comp left knee injury. [Claimant] states his right knee hit the inside of the car on impact. [Claimant] states his right knee, neck and back pain is all new after this 10-14-12018 crash.[5] [*Claimant's name, redacted*.]

Claimant settled his workers' compensation claim while overlapping with a new claim for the same body parts and conditions. This indicates that Claimant was not truthful with regard to his allegations of injuries related to the February 3, 2021 U-Haul incident.

23. Further records from Dr. Wakeshima, after the settlement, also show that the representation to Dr. Hughes that Claimant was "perfect" was incorrect. On February 1, 2019, Claimant was again evaluated by Dr. Wakeshima. He reported that his low back had worsened and was asking for injections for the low back pain. He did not give the history of the intervening MVA. He was using a cane, wearing knee braces on both knees, and an ankle brace. Dr. Wakeshima arranged for injections. However, when Claimant returned on March 1, 2019, Dr. Wakeshima discharged him for non-compliance with his opioid agreement based upon a urinalysis that showed morphine and diazepam metabolites, none of which appeared to have been prescribed. In the meantime, Claimant was also being treated in Chicago and Colorado for injuries attributed to the October 2018 MVA. In May, 2019, he was treating for that MVA and complained of low back, bilateral leg pain, bilateral shoulder pain, right knee pain, including popping clicking, give-way issues affecting his activities of daily living and function, neck pain, midback pain, headaches, tinnitus, sleep and mood issues. This is far from "perfect" as represented to Dr. Hughes. Dr. Robert Williams, of Clinica Colorado, noted that "He cancelled the Ortho referral here and on the advice of his attorney went to Chicago (where he was injured in 2018) to see an orthopedist there. They are planning on giving him some injections in the back and neck." On September 11, 2020 he continued to diagnose musculoskeletal pain, chronic radicular low back pain among other diagnosis.

24. The 2016 workers' compensation claim and the 2018 MVA were not the first accidents Claimant had alleged caused injury to his neck, back, shoulders and knees as well as psychological issues including depression. On October 12, 2013 Claimant was evaluated for neck and low back injuries related to another MVA the prior month. Then on November 24, 2013 Claimant reported another injury three days prior causing mid back, low back and left knee injuries. There are also indications that Claimant's psychological problems date back many years. On March 27, 2014 Claimant was seen at Riverside Community Hospital in California with a history of depression, substance abuse in the ED with psychosis, exhibiting paranoia, delusions, and disorganized thought process due to being off psycho meds. Claimant was hospitalized from March 28, 2014

[5] Ex. N, Bates 697

to April 2, 2014. These complaints clearly goes back many years. Claimant's back pain was described as "chronic" in 2013, as were his "severe" psychological issues.

25. As found, Claimant has failed to show by a preponderance of the evidence that he sustained compensable injuries on February 3, 2021 in the course and scope of his employment. In fact, it is more likely than not that Claimant had chronic ongoing low back, mid back, bilateral shoulder, bilateral lower extremity, teeth, or face injuries, as well as psychological conditions that were ongoing for many years prior to the February 3, 2021 event, none of which were aggravated or accelerated as a result of the 2021 MVA.

CONCLUSIONS OF LAW

A. Generally

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

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

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

witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

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

B. Compensability

For a claim to be compensable under the Act, a claimant has the burden of proving that he or she suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. Section 8-41-301(1) (c), C.R.S. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). The question of causation is generally one of fact for the determination of the Judge. *Faulkner*, *supra*.

The Act distinguishes between the terms "accident" and "injury." The term "accident" refers to an unexpected, unusual, or undesigned occurrence. Section 8-40-201(1), C.R.S*., supra*. By contrast, an "injury" refers to the physical trauma caused by the accident. Thus, an "accident" is the cause and an "injury" the result. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). No benefits flow to the victim of an industrial accident unless the accident results in a compensable injury. A compensable industrial accident is one, which results in an injury requiring medical treatment or causing disability. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990).

In this matter, an incident occurred on February 3, 2021, however, there was no injury caused as a result. The substantial amount of video of Claimant immediately after the incident makes it quite clear that he was not in pain and did not experience any injury at the time of that incident. He did not display any injury or speak of any injury to the police. His co-workers are credible in their testimony that he did not display or speak of any injury for weeks after the incident, despite being directly asked about it. The fact that he underwent surgery for unquestionably chronic symptomatic preexisting conditions after the incident occurred does not lead to the conclusion that this was because of the incident.

An injury may be compensable if, at the time of the injury, the employee was performing services arising out of and in the course of the worker's employment. C.R.S. § 8-41-301(1)(b). "For an injury to occur 'in the course of' employment, the Claimant must demonstrate that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions*." Madden*

v. Mountain W. Fabricators, 977 P.2d 861, 863 (Colo. 1999). To establish that an injury arose out of employment, "the Claimant must show a causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract." *Id.* "In general, a Claimant who is injured while going to or coming from work does not qualify for recovery because such travel is not considered to be performance of services arising out of and in the course of employment." *Id.* The established reasoning behind this is that travel to the worksite does not confer a benefit upon the employer other than arrival at work, which has been rejected as justification to expand the course and scope of employment. This doctrine is commonly called the "going to and from work" rule. *Id.; Berry's Coffee Shop, Inc. v. Palomba,* 423 P.2d 2 (1967): *Colorado Civil Air Patrol v. Hagans,* 662 P.2d 194 (Colo. App. 1983).

There are exceptions to the going to and from work rule that establish a causal connection between employment and a travel injury, but these do not apply in this case. See, e.g. *Perry v. Crawford & Co.* 677 P.2d 416 (Colo. App. 1983). Under *Madden,* variables that would support an exception to the rule include: (1) whether the travel occurred during working hours, (2) whether the travel occurred on or off the employer premises, (3) whether the travel was contemplated by the employment contract and (4) whether the obligations or conditions of employment created a "zone of special danger' out of which the injury arose. The question of whether travel was contemplated by the employment contract is satisfied only if travel is a substantial part of the service to the employer, shown by, for example, (a) whether a particular journey is assigned or directed by the employer, (b) when the employee's travel is at the employer's express or implied request or when such travel confers a benefit on the employer beyond the sole fact of the employee's arrival at work, and (c) when travel is singled out for special treatment as an inducement to employment. *Madden* at 865. One of the most recent ICAO cases to use the *Madden* analysis was *Essary v. General Dynamics* WC 5-117-912 (ICAO December 1, 2020), aff'd, Colo. Ct. App, 10CA2103, August 12, 2021, unpublished. In that decision, the ICAO found that Claimant's travel to work when on call did not create an exception to the "going to and from work" rule.

Essary and *Madden* both cite to the case of *Varsity Contractors v. Baca*, 709 P.2d 55 (Colo. App. 1988), which discusses that the use of a company vehicle does not create an exception to the "going to and from work" rule. In *Baca,* the car and gas were provided by the employer for personal and business use and Claimant was on call when driving at the time of the accident. This still did not mandate a finding that the accident involved was an exception to the "going to and from work" rule.

In this case, Claimant did not receive additional remuneration for travel to and from work, no payment for being on call, no persuasive evidence that Claimant was on his way to his plow snow on the properties at the time of the U-Haul incident, and no persuasive evidence that travel to and from the job site was an inducement to employment. See, *Hafner v. Stergeon Electric*, W.C. Nos. 4-507-018 and 4-506-807 (ICAO June 26, 2007)(Claimants were paid additional wages for a particular job, which was determined to be for travel costs driving to a Casino Project in Black Hawk, therefore an incentive to travel); *Sanchez v. Accord Human Resources,* W.C. 4-551-435, 4-552-982 (ICAO May 19, 2003). As found, Claimant was driving the company pick up with the plow home, but was not on the clock, and was not on his way to perform services for the employer with that truck. In the end, as found, there was no snow and no need to use the plow. It is

found and concluded that, Claimant's situation is not an exception to the going and coming rule as he was not in the course and scope of employment when this incident occurred.

Claimant failed to prove that he experienced a compensable work injury on February 3, 20221 as he was clearly not injured in that event as demonstrated by observing the video, which lasted a substantial amount of time after the event. As found, the lack of damage to his vehicle, his failure to complain of any injury or report any injuries to the police, his ability to walk, bend, lift, stand, and turn his head, with no difficulty at all, support the finding that he, in fact, sustained to injury or disability. Further, as found his current history and testimony is unlikely as he was not a credible historian. He mislead his own IME physician, Dr. Hughes by not disclosing prior complaints and injuries. Even Dr. Hughes didn't support him in his "whole body" claim, and narrowed his opinion down to the knee. That opinion was based upon his lack of knowledge of the history of that knee. After reviewing the medical records, it is clear that Claimant has monetized his body in multiple personal injury and workers' compensation claims. The records show has occurred from at least the 2016 workers' compensation claim. He then claimed PT in 2018, and just as he was settling his 2016 claim, including claiming to be permanently and totally disabled, he claimed a new accident had caused new injuries or aggravations. As found, Claimant provided an incomplete history to those providers, and started up a new personal injury claim for the same body parts. It is clear that all the records of prior injuries have not been provided by the parties as there is mention of a motor vehicle accident in Chicago and treatment for the same body parts in California. Claimant may have had surgeries since the February 3, 2021 incident, as he testified, (as the records of all the surgeries were not in evidence), but the treatment for any of those conditions alleged by Claimant were not proximately caused by the U-Haul incident.

Claimant had ample opportunity to present evidence to prove that the incident of February 3, 2021, may have caused injuries, to his neck, low back, head, jaw, teeth, right shoulder, right knee, light headedness, blurry vision, ringing in his ears, sensitivity to light and anxiety, but, as found he specifically failed to prove by a preponderance of the evidence that any of the claimed conditions were proximately caused by the incident as he claims. Claimant simply did not present evidence that could overcome the clear medical and factual record. No treatment was necessitated by the February 3, 2021 incident. The video is clear. Everything claimed was clearly pre-existing. As found, the large gap of time before Claimant sought treatment, while continuing to perform his regular duties for Employer, is a key factor in the determination that no disability was created by the U-Haul incident of February 3, 2021. Even if Claimant was injured, it is found that he was not in the course and scope of employment at the time as he was off the clock and heading home after work. This is simply not a compensable work injury.

All other issues are moot in light of a finding that the claim is not a compensable event.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant failed to prove by a preponderance of the evidence (that it was more likely than not) that he was injured in the course and scope of his employment on February 3, 2021, and his claim is *denied* and *dismissed.*

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

DATED this 30th day of September, 2022.

Digital Signature

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